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Supreme Court of the United States

OCTOBER TERM, 1949 / 1950

No. 556 B

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
AN UNINCORPORATED ASSOCIATION, PETI-
TIONER,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF
THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1950.

CERTIORARI GRANTED MARCH 13, 1950.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10002.

JOINT ANTI-FASCIST REFUGEE COMMITTEE, an unincorporated association, Appellant,

v.

TOM C. CLARK, Attorney General of the United States,
Seth W. Richardson, Chairman of the Loyalty Review Board of the United States Civil Service Commission,
et al., Appellees.

Appeal from the District Court of the United States for
the District of Columbia.

Joint Appendix

[fol. 2] **IN UNITED STATES DISTRICT COURT, DISTRICT OF
COLUMBIA**

Civil Action No. 561-48

JOINT ANTI-FASCIST REFUGEE COMMITTEE, an unincorporated association, located at 192 Lexington Avenue, New York City, New York, Plaintiff,

against

TOM C. CLARK, Attorney General of the United States,
Seth W. Richardson, Chairman of the Loyalty Review Board of the United States Civil Service Commission,
Harry A. Bigelow, **John Harlan Amen**, **George W. Alger**, **Aaron J. Brumbaugh**, **John Kirkland Clark**,
Harry Colmery, **Tom J. Davis**, **Burton L. French**, **Meta Glass**, **Earl Harrison**, **Garret Hoag**, **Wilbur LaRoe, Jr.**,
Arthur F. MacMahon, **Charles E. Merriam**, **Henry Parkman, Jr.**, **Charles Sawyer**, **Murray Seansonood**, **Harry L. Shattuck**, **Mrs. Harper Sibley**, **Paul M. Hebert**, **Lawrence T. Lee**, members of the Loyalty Review Board of the United States Civil Service Commission, Defendants.

COMPLAINT—Filed February 10, 1948

The plaintiff by its attorneys Rogge, Fabricant, Gordon & Goldman and Wolf, Popper, Ross & Wolf

respectfully shows to this Court and alleges for its complaint:

As a First Separate and Distinct Claim

First: This is an action for a declaratory judgment and for equitable relief arising under the Constitution and laws of the United States and involves a matter in controversy [fol. 3] which exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

Second: The jurisdiction of the Court in this action arises under Sections 11-301, 11-305 and 11-306 of the District of Columbia * * * under Section 24 of the United States Judicial Code (28 U. S. C. A. * * * Section 274d of the United States Judicial Code (28 U. S. C. A. § 400), and Section 380a of Title 28 of the United States Code (28 U. S. C. A. § 380a).

Third: Defendant Tom C. Clark is the Attorney General of the United States and is found within the District of Columbia.

Fourth: Defendant Seth W. Richardson is the Chairman of the Loyalty Review Board of the Civil Service Commission; and defendants Harry A. Bigelow, John Harlan Amen, George W. Alger, Aaron J. Brumbaugh, John Kirkland Clark, Harry Colmery, Tom J. Davis, Burton L. French, Meta Glass, Earl Harrison, Garret Hoag, Wilbur LaRoe, Jr., Arthur W. MacMahon, Charles E. Merriam, Henry Parkman, Jr., Charles Sawyer, Murray Seansonood, Harry L. Shattuck, Mrs. Harper Sibley, Paul M. Hebert, and Lawrence T. Lee are the other members of that Board. The Loyalty Review Board is located in the District of Columbia and each of the members thereof is to be found within the District of Columbia.

Fifth: Plaintiff, an unincorporated association located in the City and State of New York, is a charitable organization engaged in relief work. The plaintiff carried on its relief activities from on or about March 11, 1942 to on or about May 14, 1946 under license #539, issued by the President's War Relief Control Board, and thereafter, since the termination of the President's War Relief Control Board on or about May 14, 1946 by Executive Order #9723, the plaintiff has voluntarily submitted its program, budgets and audits for inspection by the

Advisory Committee on Voluntary Foreign Aid of the United States Government.

[fol. 4] Sixth: Since its inception on or about February 24, 1942, the plaintiff, through voluntary contributions, has raised funds for and disbursed the funds thus raised for the benefit of those anti-fascist refugees who had fought with and assisted the duly constituted government of Spain against the overthrow of that government, by Francisco Franco and others, through force and violence. The aims and purposes of the plaintiff organization are to raise, administer and distribute funds for the relief, and rehabilitation of Spanish Republicans in exile and other anti-fascist refugees who fought in the war against Franco. Before the end of the war in Europe, this relief consisted of: (1) the release and assistance of those of the aforesaid refugees who were in concentration camps in Vichy France, North Africa and other countries; (2) transportation and asylum for those of the aforesaid refugees in flight; (3) direct relief and aid, to those of the aforesaid refugees requiring help, through the Red Cross and other international agencies. At the present time, the Joint Anti-Fascist Refugee Committee relief work is principally devoted to aiding those Spanish Republican refugees, and other anti-fascist refugees who fought against Franco, located in France and Mexico.

Seventh: Pursuant to its aims and purposes, the plaintiff organization has, from its inception in 1942 through the end of 1947, disbursed a total of \$1,011,448.00 in cash and \$217,903.00 in kind for the relief of antifascist refugees and their families. The relief included money, food, shelter, educational facilities, medical treatment and supplies, and clothing to recipients in France, North Africa, the Dominican Republic, Portugal, Switzerland, Cuba, Venezuela, Mexico, the Netherlands, Spain, and the United States.

Eighth: By means of voluntary and paid assistance, the plaintiff organization has raised funds from contributors at social affairs, rallies, meetings, dinners, theatre parties, etc. In order to carry on the aforesaid work, plaintiff [fol. 5] has built up and is dependent upon the continued good will of the people of the United States and upon the continued maintenance of its reputation of engaging in relief work for the benefit of anti-fascist refugees.

Ninth: The acts of the defendants as hereinafter set forth have seriously and irreparably damaged and impaired and will continue to seriously and irreparably damage and impair the favorable reputation, moral support, and good will of the American people enjoyed by plaintiff and necessary for the continuance by the plaintiff of its charitable activities.

Tenth: On or about March 25, 1947, the President of the United States issued Executive Order #9835, published at page 1935 of volume 12 of the Federal Register.

Eleventh: Executive Order #9835 recites that it was issued by the President:

“ . . . by virtue of the authority vested in me by the Constitution and the statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and Section 9A of the act approved August 2, 1939 (18 U. S. C. 61 i), and as President and Chief Executive of the United States . . . ”

Twelfth: Said Executive Order provided, generally, for “loyalty investigations” of civilian employees in the Executive Branch of the Federal Government and of applicants for civil employment in the Executive Branch of the Federal Government.

Thirteenth: Part III, section 1 of said Executive Order #9835 provided for the establishment of a Civil Service Commission Loyalty Review Board and pursuant thereto such a Board was established and the chairman and members thereof appointed by the President of the United States on or about November 8, 1947.

Fourteenth: Part V, section 2(f) of said Executive Order #9835 specified that among the “activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty” is the applicant’s or employee’s “membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group, or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution

of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Fifteenth: Part III, section 3 of said Executive Order #9835 further provided:

"3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group, or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies."

Sixteenth: In a letter dated November 24, 1947 from the defendant Tom C. Clark to the defendant Seth W. Richardson, purportedly submitted pursuant to Part III, section 3 of Executive Order #9835, ninety organizations (sometimes hereinafter referred to as "designated organizations") including the plaintiff, were listed as organizations named by the Department of Justice as "subversive" although the plaintiff never received any notice or hearing with respect to the aforesaid designation.

[fol. 7] Seventeenth: On or about December 4, 1947, the defendant Seth W. Richardson sent the aforesaid letter together with the list of designated organizations to the local departments and agencies which assist in the administration of Executive Order #9835 and on or about the same time the aforesaid letter was released to and widely publicized by the public press.

Eighteenth: Upon information and belief, the designation of the plaintiff by the defendant Tom C. Clark and the dissemination of said designation through the public press by the defendant Seth W. Richardson has caused and will continue to cause plaintiff to suffer loss of business and patronage since as a result of the aforesaid acts of the defendants:

1) The United States Bureau of Internal Revenue has deprived the plaintiff of its status as a tax exempt organization;

2) Many contributors, especially present and prospective civil servants, have instructed the plaintiff to strike their names from the plaintiff's list of contributors and have either reduced the amount of or discontinued entirely their contributions;

3) Many potential contributors, especially present and prospective civil servants have declined and will continue to decline to make contributions to the plaintiff organization;

4) Plaintiff has been refused licenses required of organizations soliciting funds;

5) Plaintiff has been hampered and will continue to be hampered in obtaining the use of private homes or in renting halls and similar places for the social affairs, rallies, meetings, dinners, theatre parties, etc., necessary to the fund-raising activities of the plaintiff;

6) Reservations obtained by the plaintiff for halls and similar places for the purpose of conducting social affairs, rallies, meetings, dinners, theatres, etc., necessary to the fund-raising activities of the plaintiff have been and will continue to be cancelled;

[fol. 8] 7) Many prominent speakers, entertainers, etc., have refused and will continue to refuse to participate in the social affairs, rallies, meetings, dinners, theatre parties, etc., necessary to the fund-raising activities of the plaintiff;

8) Voluntary members and other participants in the activities of the plaintiff organization have been vilified and subjected to public shame, disgrace, ridicule and obloquy thereby inflicting upon them economic injury and discouraging some of said members and participants from continuing in the activities of the plaintiff organization.

Nineteenth: The aforesaid actions taken by the defendants Tom C. Clark and Seth W. Richardson were unauthorized and without warrant in law and amount to a deprivation of the rights of the plaintiff in violation of the Constitution of the United States.

Twentieth: Section 9A of the Hatch Act enacted August 2, 1939 (53 Stat. 1148, 18 U. S. C. A. § 61 i), is unconstitutional and void as applied herein by Executive Order #9835, for the following reasons:

1) It is repugnant to the Constitution of the United States as a deprivation of freedom of speech, of the press, and of assembly and association in violation of the First Amendment.

2) It is repugnant to the Constitution of the United States as a deprivation of the fundamental rights of the people of the United States reserved to the people of the United States by the Ninth and Tenth Amendments.

3) It is repugnant to the Constitution of the United States as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment.

Twenty-first: Executive Order #9835 on its face and as construed and applied herein by the defendants exceeds the powers vested in the President by the United States Constitution and is null and void for the following reasons:

1) It is repugnant to the Constitution of the United States and a deprivation of freedom of speech, of the press, and of assembly and association in violation of the First Amendment and the Fifth Amendment.

[fol. 9] 2) It is repugnant to the Constitution of the United States as a deprivation of the fundamental rights of the people of the United States reserved to the people of the United States by the Ninth and Tenth Amendments.

3) It is repugnant to the Constitution of the United States as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment.

Twenty-Second: There exists between plaintiff and the defendants herein an actual controversy, and plaintiff has instituted this action for the purpose, among others, of having the aforesaid Executive Order #9835 declared unconstitutional as hereinbefore more particularly set forth.

Twenty-Third: A delay in ascertaining and determining the rights of plaintiff will result in further serious and irreparable loss and damage to it, and this loss and damage are and will be irremedial unless relief is granted by this

Court. There is no other remedy afforded by law or statute against the illegal acts and conduct of the defendants, save the equity powers of this Court, and unless the relief prayed for is granted, plaintiff will suffer irreparable loss and damage.

Twenty-Fourth: By reason of the premises plaintiff is entitled to relief against the defendants under the Federal Declaratory Judgment Act of June 14, 1934, Title 28, U. S. Code, Section 400, and under the Constitution of the United States.

As a Second Separate and Distinct Claim

Twenty-Fifth: Repeats and realleges the allegations contained in paragraphs marked "First" through "Twenty-Third" hereof with the same force and effect as if set forth at length herein.

Twenty-Sixth: The damage to plaintiff above described will continue unless and until the defendants are enjoined from publicizing and sending to departments and agencies in the Executive Branch of the Federal Government the [fol. 10] name of plaintiff as a designated organization, and are directed to remove plaintiff's name from the list already circulated and issued, and are directed further to make known this action in the same manner in which they made known the inclusion of plaintiff's name on the above mentioned list, and are directed further to take no action which may be based upon the inclusion of the plaintiff's name in the aforesaid list.

Twenty-Seventh: The plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays that a three judge court be convened, pursuant to Title 28, U. S. C. A., Section 380a, and for the following relief:

1) That Section 9A of the Hatch Act as applied by Executive Order #9835 be declared unconstitutional.

2) That Executive Order #9835 be declared unconstitutional.

3. That the defendants and their officers, agents, and employees be enjoined from designating, declaring, circulating or publicizing the name of plaintiff as a designated

organization; and that the defendants and their officers, agents and employees be directed to remove the name of plaintiff from the list of designated organizations already circulated, issued and published, and to make a public statement of this removal; and that the defendants and their officers, agents, and employees be directed to take no action which may be based upon the inclusion of the plaintiff's name in the list of designated organizations.

4) That pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction, restraining the defendants and their officers, agents, and employees from designating, declaring, circulating and publicizing the name of plaintiff as a designated organization; directing the defendants and their officers, agents and employees to remove the name of plaintiff from the list of designated organizations already circulated, issued and published, and to make a public statement [fol. 11] of this removal; and directing the defendants and their officers, agents and employees to take no action upon the basis of the inclusion of the plaintiff's name in the list of designated organizations.

5) For such other and further relief as this Court may deem proper.

O. John Rogge, Rogge, Fabricant, Gordon & Goldman, 401 Broadway, New York City 13, N. Y., 1700 Eye Street; N. W., Washington 6 D. C.; Wolf, Popper, Ross & Wolf, 160 Broadway, New York City 7, N. Y., 902 20th Street, N. W., Washington, D. C., Attorneys for Plaintiff.

[Verification of Dr. Edward K. Barsky omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—Filed February 10, 1948.

The plaintiff moves the court for a preliminary injunction against all the defendants herein, their agents, servants, employees and attorneys and all persons in active concert

and participation with them, pending the final hearing and determination of this action:

1) restraining the defendants and their officers, agents, and employees from designating, declaring circulating and publicizing the name of plaintiff as a designated organization;

2) directing the defendants and their officers, agents and employees to remove the name of plaintiff from the list of [fol. 12] designated organizations already circulated, issued and published, and to make a public statement of this removal;

3) directing the defendants and their officers, agents, and employees to take no action upon the basis of the inclusion of the plaintiff's name in the list of designated organizations; and

4) for such other and further relief as this Court may deem proper.

on the grounds that:

a) the defendants have performed and will perform acts which, unless restrained and directed by this court as aforesaid, will result in irreparable injury, loss and damage to the plaintiff, as more particularly appears in the complaint verified by Dr. Edward K. Barsky and in the affidavits of Dr. Edward K. Barsky and Helen Bryan, which are attached hereto; and

b) the issuance of a preliminary injunction herein will not cause undue inconvenience to the defendants but will prevent irreparable injury to the plaintiff.

Dated: New York, N. Y., February 10, 1948.

Rogge, Fabricant, Gordon & Goldman, by O. John Rogge, 401 Broadway, New York City 13, N. Y., 1700 Eye Street, N. W., Washington 6, D. C.; Wolf, Popper, Ross & Wolf, 160 Broadway, New York City 7, N. Y., 902 20th Street, N. W., Washington, D. C., Attorneys for Plaintiff.

[fol. 13]

U. S. MARSHAL'S RETURN

Served copies of written Motion on Seth W. Richardson, Chairman, by personally serving Wm. Hull, Exec. Asst.,

2-12-48; District Atty. Geo. M. Fay personally 2-10-48; Served the Atty. General Tom Clark, by registered mail (receipt #323053) 2-18-48.

W. Bruce Matthews, U. S. Marshal in and for the District of Columbia, by E. J. McClay, Deputy U. S. Marshal.

NOTICE

To: ———, Washington, D. C.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at the United States District Court House for the District of Columbia on the 19th day of February, 1948 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Rogge, Fabricant, Gordon & Goldman, by O. John Rogge, 401 Broadway, New York City 13, N. Y., 1700 Eye Street, N. W., Washington 6, D. C.; Wolf, Popper, Ross & Wolf, 160 Broadway, New York City 7, N. Y., 902 20th Street, N. W., Washington, D. C., Attorneys for Plaintiff.

[fol. 14]

U. S. MARSHAL'S RETURN

Served copies of written Notice on within named Seth W. Richardson, Chairman, by personally serving Wm. Hull, Exec. Asst., 2-12-48; District Atty. Geo. M. Fay personally 2-10-48; Served the Atty. General Tom C. Clark by registered mail (receipt # 323053) on 2-18-48.

W. Bruce Matthews, U. S. Marshal in and for the District of Columbia, by E. J. McClay, Deputy U. S. Marshal.

AFFIDAVIT OF DR. EDWARD K. BARSKY

STATE OF NEW YORK,

County of New York, ss:

Dr. Edward K. Barsky, being duly sworn, deposes and says:

I am the chairman of the Executive Board of the Joint Anti-Fascist Refugee Committee, and submit this affidavit in support of the motion of the Joint Anti-Fascist Refugee

Committee for a preliminary injunction in the above-entitled matter.

The Joint Anti-Fascist Refugee Committee is a relief organization established in February, 1942, and is comprised of a national office (referred to as the Executive Board, located in New York City and local chapters in New York City, Boston, Philadelphia, Chicago, Seattle, Los Angeles, Berkeley and San Francisco. Miss Helen R. Bryan is the National Executive Secretary and is authorized by the constitution of the Joint Anti-Fascist Refugee Committee to handle the administrative aspects of the organization.

[fol. 15] The Joint Anti-Fascist Refugee Committee was organized to raise, administer and distribute funds for the relief and rehabilitation of Spanish Republicans in exile and other anti-fascist refugees who fought Franco. Before the end of the war in Europe the Committee worked for the release and assistance of the above-described refugees held in concentration camps; the transportation and asylum of those of the above-mentioned refugees who were in flight; and to provide direct relief to the above-mentioned refugees through the Red Cross and other international agencies. With the end of the war in Europe, the Committee turned its attention principally to providing money, food, clothing, medicine and other relief to Spanish Republican and other anti-Franco refugees in France and Mexico.

For the achievement of these objectives, the Joint Anti-Fascist Refugee Committee has conducted very extensive fund-raising campaigns. Licensed by the President's War Relief Control Board until the expiration of that Board in May of 1946, the Joint Anti-Fascist Refugee Committee has held parties, rallies, meetings, dinners, dance recitals, theatre parties, benefits, etc., to raise funds for anti-fascist refugees. And, consequently, the Joint Anti-Fascist Refugee Committee has been enabled to provide, from its inception in 1942 through the end of 1947, a total of \$1,229,351.00 worth of relief.

The scope of the relief work done by the Joint Anti-Fascist Refugee Committee from 1942 to the present has been so considerable that only an outline of that work will be presented:

1. Relief in the Dominican Republic

In 1943 Dr. Barney N. Morgan, Superintendent of the Board for Christian Work in Santo Domingo and Director

of the American Hospital in Ciudad Trujillo, formally called upon this organization to request immediate aid for the Spanish Republicans in the Dominican Republic. In his presentation to us he stated that unless a minimum of 200 [fol. 16] Spanish refugees were aided he had no guarantee that they could live. He stated that many of them were still suffering from wounds contracted during the Spanish civil war; that a very high percentage of them had tuberculosis and others would contract it in the near future; and that anemia was at a high point. The Spanish children were so undernourished as to be in grave danger of death. The Government of the Dominican Republic was unable to provide sufficient economic opportunities for those Spanish refugees who were able to work. In general, the living conditions of the Spanish Republicans in the Dominican Republic were far below the low standards which prevailed in that country. In addition to illness, unemployment, lack of food and shelter, the climatic conditions of the country only served to accentuate the undernourishment and illness existing among the Spanish refugee group. The farm projects which they attempted failed due to lack of support.

On the basis of Dr. Morgan's presentation, a project was accepted to send aid for the Spanish refugees in the Dominican Republic to be administered by him. The Joint Anti-Fascist Refugee Committee sent him, for this purpose, a total of \$19,000 from March, 1943 through December, 1945.

For over three years, funds were sent regularly which aided approximately 50 Spanish refugees and their families. Payments up to \$150.00 a month were obtained by those recipients of our relief. It became increasingly clear that some of these individuals had to be transported to Mexico where physical and economic conditions would be much more favorable for them. Therefore, in addition to the direct relief in Santo Domingo, this Committee has transported approximately 85 refugees from Santo Domingo to Mexico.

2. Relief in North Africa

Shortly after the liberation of North Africa by our troops, it became apparent that the needs among Spanish refugees [fol. 17] in North Africa were acute. William D. Weatherford of the American Friends Service Committee stated in April 1945 that there were approximately 9000 Spanish Republicans in North Africa. Some were Spanish Republi-

cans who had fled to North Africa from Spain; others had been shipped from France to North Africa by the Vichy French government for the purpose of cheap labor. That was in 1941. The already mistreated, enfeebled and sick Spanish refugees transported from France were put to work building the Trans-Sahara Railroad, and performing other slave labor under confinement, for the benefit of the Vichy forces. The lack of water, insufficient food, clothing and shelter, extremes of heat and cold, and brutal punishment to which these refugees were subjected, caused an unestimated number of deaths and permanently impaired the health of all the survivors.

After the Allied invasion of North Africa, Spanish Republicans interned in camps were released. Thereafter an organization was formed by the liberated Spanish refugees for their mutual aid. At that time there was considerable employment for these Spaniards in construction and repair work for the Allied Armies so that the relatively able-bodied were in a position to help their incapacitated compatriots.

With the help of the American Friends Service Committee and UNRRA officials in North Africa, this organization was transformed into *Amicales d'entre aide des refugios espagnols*. *Amicales* were created in Oran, Algiers, Casablanca and Tunis. The French authorities quickly recognized these *Amicales* and authorized the *Amicales* to dispense relief without political or religious discrimination among the Spanish refugee communities.

In October, 1943, the Joint Anti-Fascist Refugee Committee began sending under a Treasury Department license, regular sums of money to Dr. Kendall Kimberland, Director for the American Friends Service Committee in North Africa, for the use of the *Amicales*. Following the closing [fol. 18] of the American Friends Service Committee office, the funds were sent, upon the recommendation of the American Friends Service Committee, directly to Victoriano Provedo Maestro, Treasurer of the *Amicales* of Algiers. The Committee sent \$5,000.00 a month during October, November and December in 1943 for relief in North Africa; \$42,500 in 1944; and \$25,000 in 1945—a total of \$82,500. Thousands of individuals were thus aided with our money. This aid has taken the form of financial assistance to the physically disabled, the old people and individuals still suffering from injuries incurred in the Spanish civil war. The Joint Anti-Fascist Refugee Committee also provided

for the economic rehabilitation of Spanish refugees in North Africa.

3. Relief in Portugal

The distribution of funds for the medical care and relief among the Spanish refugees in Portugal has been through the medium of the Unitarian Service Committee. The number of Spanish refugees in and around Lisbon varied, but generally a minimum of 300 urgently required medical care, food and clothing.

On one occasion, in 1946, the Joint Anti-Fascist Refugee Committee collaborated with the Unitarian Service Committee to transport and settle more than 30 Spanish refugees from Lisbon to Mexico. The Unitarian Service Committee secured visas for these refugees and was responsible for the transportation expenses from Lisbon to Mexico; the Joint Anti-Fascist Refugee Committee was responsible for their rehabilitation needs after they arrived in Mexico.

4. Relief in Switzerland

As a result of the Nazi terror in France, many Spanish refugees fled French concentration camps. Some of them were caught, but others found their way safely into Switzerland. The Joint Anti-Fascist Refugee Committee sent money regularly each month through the Unitarian Service [fol. 19] Committee to assist these refugees. The Swiss Government and the Swiss people were most generous in their aid, but required the assistance of private agencies. The Joint Anti-Fascist Refugee Committee sent money to Switzerland which was used to supply food, medicine, money, clothing, etc., for Spanish refugees located there.

5. Relief in Cuba, Venezuela and the Netherlands

Small amounts were sent to Spanish Republicans, and other refugees who had fought Franco, in Cuba, Venezuela, and the Netherlands. Artificial limbs and medical assistance were purchased with the money sent by the Committee.

6. Relief in France

Following the liberation of France, in which the Spanish Maquis played an important and heroic part, saving the

lives of many American soldiers, it was learned that there were 150,000 to 200,000 Spanish Republican refugees in France. As a result of the war years, followed by years of concentration camps, prisons and slave labor, the health of many of these men, women and children had been seriously, if not premanently undermined and help for them was imperative.

Officials of the Unitarian Service Committee estimated that soon after the liberation of France, there were a minimum of 40,000 Spanish refugees in the vicinity of Toulouse. Hundreds of families located there had suffered losses by death or had among them wounded and mutilated men. The situation of the children was most alarming. Practically all the children were undersized and there was a high rate of tuberculosis and malnutrition among them.

A large group of Spanish refugees were located in and around Paris. Many were blind and limbless; all were in bad health. Large families were living in single rooms and [fol. 20] lacked clothing and shoes. Children were unable to go to school for lack of clothing.

There were a minimum of 5,000 Spanish refugees in the vicinity of Marseilles suffering from exposure, illness and inadequate diet.

The whole problem of care for the Spanish refugees was increased by the return to France of the Spanish refugees who had spent months and years in the Nazi prisons. These men were walking skeletons and created an acute problem of immediate medical care.

Many of the Spaniards in France were mutilated because of the war in Spain and in France. The number totaled approximately 3,500. Some of these were totally incapacitated, either blind or lacking both arms and both legs. Their medical and surgical needs had to be met after many years of neglect; vocational training had to be provided for them.

In March, 1945, we started our program of aid for the Spanish Republicans in France. The Committee established and maintained two hospitals for the Spanish Republicans, one in Toulouse and one in Varsovie, in France. Additional funds have been used to help support the families, the heads of which had been returned to Franco Spain or died in the past few years. Aid was also given to the children of the Spanish Republicans.

We have received many cablegrams from Paris requesting immediate clothing. One cablegram stated that the "situation of the Spanish refugees increasingly desperate. Hundreds without anything but last vestiges garments pathetically inadequate for approaching fuelless winter cold slopes ley Pyrenees infants wrapped in newspaper. General resistance lowered all kinds throat lung other ailments rampant. Rush clothing stop Clothing is life stop. Please relay this message Unitarian Boston." In response to this appeal we began a clothing collection for the refugees in [fol. 21] France and in the short period from November 12 to December 31, 1945, 36,445 lbs. of clothing were turned over to the Unitarian Service Committee for shipment to France. Clothing collection continued at approximately the same tempo.

The Committee presently maintains and supports the Walter B. Cannon Memorial Hospital at Varsovie. This hospital not only cares for the hospitalization needs of Spanish refugees, but also maintains an out-patient clinic which cares for 3,000 patients a month. Further, the Committee sustains a convalescent home at Meillon. And for the welfare of the children of Spanish Republicans in France, the Committee participates in the San Goins Home.

These various activities of the Committee are current, and the Committee intends to continue them so long as Spanish refugees require aid. In order to do so, it is necessary to make regularly monthly payments to the institutions concerned. At the present time, the Joint Anti-Fascist Refugee Committee is committed to regular monthly remittances of \$5,400. These commitments must be met if the Committee's relief work in France is to be effectual.

7. Relief in Mexico

Many of the Spanish refugees are located in Mexico. As Spanish Republicans elsewhere, many are suffering from the wounds and illnesses incurred in Spain from 1936 to 1939. Many of the families are without their husbands or fathers. The Spanish refugee group in Mexico has, on the whole, adapted itself well to its temporary home in Mexico. However, the demand and need for help among these refugees is still great.

The relief work of the Committee has been performed through its agency in Mexico, the Fondo de Ayuda Economica a Los Refugiados Antifascistas Europeos En Mexico, known as FAERAE. The sole purpose of this agency is to [fol. 22] distribute school, hospital and direct relief for the Committee in Mexico.

One aspect of the relief work of the Committee in Mexico is a scholarship plan for Spanish refugee students in Mexico City, from nursery school through college in the various schools and colleges of Mexico. A large number of the students are being educated in the Luis Vives Institute. This school has been operated by Mexican and Spanish teachers and attended by Mexican and refugee children. The school meets the standards of the Board of Education of Mexico and enjoys a high academic standing in Mexico City. At any given time, between 100 and 200 refugee children attend this school. Scholarships in many instances have provided lunch and transportation to and from the school.

To meet the critical health situation of Spanish refugees in Mexico, the Joint Anti-Fascist Refugee Committee decided to create the Edward K. Barsky Hospital which now has a high standing among Mexican doctors. The staff of the hospital is composed of outstanding Spanish Republican doctors who consult regularly with the Mexican physicians.

The Hospital services the medical and surgical needs of the community; maintains an out-patient clinic, a well equipped maternity ward and laboratory facilities.

In addition we supply direct relief. This aid provides for individual needs, exclusive of the hospital, such as dental work care, convalescent care, economic aid, and other needs that may arise.

8. Relief in the United States

The Joint Anti-Fascist Refugee Committee has also extended relief to those refugees who fought Franco and who had been stranded within the United States. A number of these were in transit to Mexico. The Committee provided some of these refugees with direct relief such as medical care, hospitalization, food, clothing, relief grants, etc.

[fol. 23] 9. Relief in Spain

Through the American Friends Service Committee operating in Spain, we sent funds for the relief of members of the International Volunteers, most of whom were incarcerated in the prison of Miranda de Ebro. Practically all of these International Volunteers are now out of Spain, but while we were aiding them through the Quakers, this aid was in the form of food, clothing and medical supplies.

At the nub of all the above-described activities of the Joint Anti-Fascist Refugee Committee is its fund-raising. The welfare, and the very sustenance of many anti-fascist refugees depends upon the contributions of Americans. The good-will of the American public towards the Joint Anti-Fascist Refugee Committee is the life blood of those refugees. The relief work done by the Joint Anti-Fascist Refugee Committee in the past cannot continue if its fund-raising is impaired or frustrated. Accordingly, the organization is compelled to bring this action and seek the temporary injunctive relief requested, for the effect of Executive Order #9835 is to diminish and possibly destroy our ability to raise funds and thereby diminish and possibly destroy the relief we provide for the refugee-beneficiaries of our activities.

Executive Order #9835, and the subsequent designation of the Joint Anti-Fascist Refugee Committee by the Attorney General which was disseminated by the public press, threaten to destroy the good-will of the American public which the Joint Anti-Fascist Refugee Committee has cultivated for the five years of its existence. Although the list of designated organizations was publicized only about two months ago, it has already seriously impaired the activities of the Joint Anti-Fascist Refugee Committee. Not only contributors, but also the personnel and facilities essential for our fund-raising have been affected by the public disapprobation which attaches to an organization thus designated by the Attorney General. As appears from Miss Bryan's affidavit which is submitted together with [fol. 24] this affidavit in support of the plaintiff's motion, contributors of many years standing, particularly present or prospective civil servants, frightened of "association" of "affiliation" with a designated organization, have instructed us to take their names from our mailing and calling lists and have either ceased contributing to

the Joint Anti-Fascist Refugee Committee or have substantially reduced their contributions; other persons who would have been inclined to contribute to the relief of refugees from Franco Spain have, through fear of economic and social consequences or through distrust of an organization designated by the Attorney General, declined to make such a contribution; the pressure created by the acts of the defendants has caused the Joint Anti-Fascist Refugee Committee to lose the assistance of valuable voluntary workers; and the public hysteria arising out of the defendants' acts has deprived the Joint Anti-Fascist Refugee Committee of access to essential facilities such as meeting places, private homes, licenses, etc. The publicly-announced decision of the Bureau of Internal Revenue to deprive the Joint Anti-Fascist Refugee Committee of its tax exempt status, which was released to the public press for February 3, 1948, (see Exhibit "1" attached to affidavit of Helen R. Bryan) will undoubtedly close to us many sources of contributions because many contributors may fear that donations to the Joint Anti-Fascist Refugee Committee will be non-deductible for tax purposes.

The experience of the Joint Anti-Fascist Refugee Committee since December 4, 1947, indicates that Executive Order #9835 provides the Attorney General with the arbitrary and discretionary power to destroy an organization. Without affording the Joint Anti-Fascist Refugee Committee any opportunity to be heard, or to appeal or otherwise review his judgment, the Attorney General is empowered by Executive Order #9835 to characterize our organization as disloyal and thereby undermine the public support without which the Joint Anti-Fascist Refugee Committee cannot survive. The grant of such power to a public official [fol. 25] violates the civil liberties which I had thought to be guaranteed by the First Amendment. The concept that some public official can act as a judge of loyalty is a new concept in American history and a departure from all of the traditions we have been taught to revere and cherish. My attorneys inform me that such action by the Attorney General is also violative of the powers reserved to the American people by the Ninth and Tenth Amendments, and that the procedures and standards involved violate the Fifth Amendment.

The unlawful actions of the defendants have seriously impaired and interfered with the activities and existence of

the Joint Anti-Fascist Refugee Committee. The damage caused has been substantial and irreparable, and unless injunctive relief is obtained the resultant damage to the Joint Anti-Fascist Refugee Committee will continue to be substantial and irreparable. Moreover, no administrative review is available nor would an action at law be adequate. Only this Court, in the exercise of its equity powers, can protect the constitutional rights of the Joint Anti-Fascist Refugee Committee which have been jeopardized by the unlawful actions of the defendants. That protection is required immediately for unless defendants are enjoined, as prayed for in the complaint and the motion for a preliminary injunction, during the pendency of this action, the Joint Anti-Fascist Refugee Committee will suffer irreparable harm.

Edward K. Barsky.

Sworn to before me this 9th day of February, 1948.
David Berger, Notary Public, State of New York,
residing in Westchester County. Cert. filed in
N. Y. Co. No. 791, Reg. No. 634-B-9. Commission
expires March 30, 1948.

[fol. 26] AFFIDAVIT OF HELEN R. BRYAN

STATE OF NEW YORK,
County of New York, ss:

Helen R. Bryan, being duly sworn, deposes and says:

I am the National Executive Secretary of the Joint Anti-Fascist Refugee Committee and submit this affidavit in support of the motion of the Joint Anti-Fascist Refugee Committee for a preliminary injunction in the above entitled matter.

As National Executive Secretary I have had a first-hand opportunity to observe the effects of the publication of the Attorney General's list of designated organizations. It has seriously impaired the fund-raising activities of the Joint Anti-Fascist Refugee Committee. I have heard and seen contributors insist that their names be taken from our mailing lists; volunteers indicate their concern as to whether they would continue to work for the organization; the reluctance of speakers, entertainers and sponsors to con-

tinue their support of our organization; and indications of many of the other impediments to our fund-raising activities referred to in the complaint and in Dr. Barsky's affidavit.

The recent decision of the Bureau of Internal Revenue "to strip tax exemption from" our organization because it was on the Attorney General's list (see report in New York Times, February 3, 1948, p. 21, copy of which is annexed hereto as Exhibit "1") is another blow to our fund-raising activities. As a result of that determination by the Bureau, contributors will, of course, be far less willing to contribute to the Joint Anti-Fascist Refugee Committee than they were in the past. The ruling of the Bureau of Internal Revenue, ensuing directly from the Attorney General's designation of the organization in his list, is sufficient by itself to sustain the contention of the Joint Anti-Fascist [fol. 27] Refugee Committee that the action of the defendants has caused the Joint Anti-Fascist Refugee Committee irreparable harm and injury.

In order that this Court might have a complete picture of the effect of the so-called "loyalty list" upon the Joint Anti-Fascist Refugee Committee, there are submitted together with my affidavit and that of Dr. Barsky, responses to a letter, a copy of which is attached hereto as Exhibit "2", which was sent to each of the local chapters of the Joint Anti-Fascist Refugee Committee, wherein the local chapters were requested to describe the effects that the listing of the Joint Anti-Fascist Refugee Committee had outside of New York. Most of the chapters reported that the effects were adverse and deleterious.

From Chicago it was reported that one local newspaper would not publish any releases of the Joint Anti-Fascist Refugee Committee; that it was becoming more difficult to get any publicity from other local newspapers; that prominent local supporters, sponsors and contributors were withdrawing support; that requests to remove names from the Joint Anti-Fascist Refugee Committee mailing lists were increasing; and that meeting places and hotels have been less accessible. (See copy of letter from Ruth Belmont attached as Exhibit "3".)

A telegram from the Executive Secretary of the Seattle, Washington, chapter of the Joint Anti-Fascist Refugee Committee states that many contributors now refuse to

make any further contributions, others ask that their names be removed permanently from the mailing lists of the Joint Anti-Fascist Refugee Committee, and still others decline to attend Joint Anti-Fascist Refugee Committee affairs. (See copy of telegram from Bonnie Bird Gundlach attached as Exhibit "4".)

The chapter of the Joint Anti-Fascist Refugee Committee in San Francisco, California, has noted increasing requests from contributors that their names be removed from the Joint Anti-Fascist Refugee Committee mailing list; the re-[fol. 28] fusals by a local of the United Public Workers, which had formerly supported the Joint Anti-Fascist Refugee Committee, to send delegates to a Work Conference scheduled by the Joint Anti-Fascist Committee for February 8, 1948, because they deemed it unwise to support a listed organization; refusals by federal employees to continue as volunteer workers for the Joint Anti-Fascist Refugee Committee; withdrawals of support by aliens who did so reluctantly, but for their own safety; and the refusal of Erika Mann to make an appearance for the Joint Anti-Fascist Refugee Committee because she felt that the fact that the Joint Anti-Fascist Refugee Committee was a designated organization made it impossible for her to consider helping the joint Anti-Fascist Refugee Committee at this time. (See copy of letter from Faith Craig attached as Exhibit "5".)

The Philadelphia chapter of the Joint Anti-Fascist Refugee Committee relates a single consequence of the Attorney General's list which alone may result in a loss of many thousands of dollars to the Joint Anti-Fascist Refugee Committee for the year of 1948. According to a letter sent by Golda Kleiner (copy of which is attached as Exhibit "6-A"), the Department of Welfare of Pennsylvania has refused to issue the local chapter a permit to solicit funds because the Joint Anti-Fascist Refugee Committee was among the organizations listed by the Attorney General (see copy of denial of application, attached as Exhibit "6-B"; and copy of letter sent to Louis F. McCabe by Mrs. Henrietta Wolfson stating reasons for denial, attached as Exhibit "6-C"). Unable to conduct any fund-raising campaigns and forced to cancel several tentative dates, the local and regional fund-raising activities of the Philadelphia chapter may be considered terminated for 1948 as a result of the Attorney General's list.

The Boston chapter of the Joint Anti-Fascist Refugee Committee writes that as a result of the Attorney General's list "the damage done to its fund-raising work for Spanish [fol.29] refugees has been most serious". (See copy of letter from Jacqueline Steiner attached as Exhibit "7-A" and copy of report enclosed in that letter attached as Exhibit "7-B"). According to the executive secretary of that chapter, sometime during the middle of January, 1948, Judge Lawrence G. Brooks was nominated for the Presiding Judgeship of the Malden District Court but that nomination was postponed in the Massachusetts Executive Council partly because Judge Brooks had been a sponsor of the Joint Anti-Fascist Refugee Committee and had chaired a meeting of the Joint Anti-Fascist Refugee Committee in Boston in August, 1947.

On January 28, 1948, Judge Brooks wrote to Miss Steiner resigning as a sponsor because "it may be incongruous for a judge of a State Court to endorse a branch of an organization which has been included by the Attorney General of the United States in a list of so-called subversive groups", although he had "seen no evidences of subversive activities on the part of the Committee and (had) no reasons to think that they have been guilty of any." This decision Judge Brooks released to the Boston newspapers at the same time, again indicating that he was motivated by the fact that the Joint Anti-Fascist Refugee Committee was on the Attorney General's list. On January 29, 1948, the day after his resignation, his nomination as Presiding Judge was confirmed.

The Judge Brooks incident had a damaging by-product since on January 29, 1948, without any notification to the Joint Anti-Fascist Refugee Committee, the Boston City Club issued a statement to the press cancelling a dinner scheduled there for February 6, 1948 by the Joint Anti-Fascist Refugee Committee as the major fund-raising event of the year for the Boston chapter (see clipping from Boston Traveler, dated January 29, 1948, a copy of which is attached as Exhibit "7-C"). The paper which informed the Joint Anti-Fascist Refugee Committee of the cancellation also telephone listed sponsors of the Joint Anti-Fascist [fol.30] Refugee Committee and as a result four resignations, in addition to that of Judge Brooks, were received by the Boston Chapter. That chapter concludes that the foregoing is "Not only . . . likely to cause further resignations and withdrawals of support from its work, but also

the money, time, and effort which must perforce be spent in answering the attacks upon it constitute a direct loss for the valiant and needy people whom it serves."

Here in New York, I have witnessed several incidents which have occurred since December 4, 1947, which vividly demonstrate that the publication of the Attorney General's list jeopardizes the Joint Anti-Fascist Refugee Committee.

A graphic illustration of the effect of the publication of the Attorney General's list upon the Joint Anti-Fascist Refugee Committee is an incident which occurred recently in connection with a Joint Anti-Fascist Refugee Committee dance planned for December 13, 1947 in Westchester.

A member of the local committee of the Joint Anti-Fascist Refugee Committee in Westchester arranged in November of 1947 for the use of the Gedney Country Club on the evening of December 13, 1947. The reservation was made with a Mr. Lewis, the owner of the Gedney Country Club. A \$50 check for the rental of the Club was sent in accordance with the arrangements. The Attorney General's list was published on December 4th. On December 6th, some of the members of the local committee checked with Mr. Lewis on the arrangements for December 13th. At that time, Mr. Lewis said nothing as to cancelling our reservation. But on Monday, December 8th, less than a week before the event was scheduled, it was learned that Mr. Lewis was going to cancel the reservation and return the check. The Board of Directors of the Club had met on Sunday, December 7th, and wanted the option withdrawn.

The local committee met on that same day to make plans to find another place. Several individuals who were requested to make their homes available refused because they [fol. 31] were fearful of vandalism. Consequently, on December 9th, the Lawrence Inn, which is a road house off the Boston Post Road in Mamaroneck, was contacted to attempt to rent the road house for the affair. The owner of the place said he was not afraid, and said he would permit us to hold the affair there. A deposit of \$50.00 was left with him.

The next morning, a local committee member tried to arrange for a paid ad in the local paper, The Reporter Dispatch. This request was refused, and the editor, Mr. Carroll informed us that he would not take any money from us "until we were cleared on the Tom Clark list".

On December 10th, a telegram was received from the Lawrence Inn stating there was some mistake about the

date and that the Inn was not available for December 13. We subsequently learned that Mr. Carroll had called the owner of the Lawrence Inn and brought pressure to bear on him.

On December 11th, The Siwanoy Hotel was contacted. The owner was informed of what had transpired and he agreed to rent us the ballroom at the Siwanoy for December 13th. We paid him \$50.00 in advance. He was thereafter called by Mr. Carroll, and various other individuals, urging him to cancel our reservations, but he refused to do so.

On December 12th, one of the members of the local committee called to report a rumor that we were going to be picketed by the Catholic War Veterans and American Legion, and the police were therefore called for protection. In response, we were informed that we needed no protection because no affair was being held since the owner of the Siwanoy had no license to run a dance. There had, however, been dances there every Saturday night.

The affair was held as scheduled on Saturday night, December 13th. There were no pickets present, but there were detectives and newspaper reporters. The police permitted no dancing at all and informed us that they would give us [fol. 32] a ticket if anyone got up to dance. The newspaper account of the dance appeared in the local press on Monday, December 15, 1947, and is attached as Exhibit "8".

Only about 200 people attended the dance. I estimate that if the affair had been held at the Gedney Country Club, we would have had at least 300 people. Moreover, the owner of the Siwanoy had no liquor license, so everyone went out and bought their own liquor. The Joint Anti-Fascist Refugee Committee collected a total of \$1,700 that evening, although we had reasonably expected \$2,500 to \$3,000 to be collected at the Gedney Country Club.

Thus, at least five civil service workers have personally requested that their names be taken from our mailing and calling lists since the publication of the Attorney General's so-called "loyalty list". In each of these instances, the individuals concerned indicated a grave anxiety as to the fact that their names were on our mailing and calling list. Each of them stayed in the office until they actually saw the cards removed from the mailing list file and destroyed. Each of these requests were made in person by

civil service workers who had previously been constant contributors and in each instance it was expressly stated that the request was made as a result of the publication of the Attorney General's list.

During recent telephone campaigns, I found that several of the people called were antagonistic. These campaigns were conducted to invite patrons of the Joint Anti-Fascist Refugee Committee to a performance of "The Cradle Will Rock", to be held on January 11, 1948, and a Dance Festival for January 25, 1948. Invitations had been sent out to our regular theater list announcing the two events, and the office then proceeded to telephone the invitees to find out who is coming, who want tickets, etc. The technical staff, in making the telephone calls, reported that they were getting very poor response. Although all those called had been steady contributors, many were abusive, saying they wanted nothing to do with our organization; and some said [fol. 33] they were no longer interested in the organization and wanted their names removed from the mailing and calling list. There were at least fifty such cases of contributors who had been on the list for years.

Another incident involved the use of the Concourse Plaza Hotel in the Bronx for a scheduled event of the Joint Anti-Fascist Refugee Committee.

During 1947, we had used the Concourse Plaza Hotel three times; twice for rallies and once for a concert. On or about December 17, 1947, a member of the local committee running the concert called and said that the American Legion and Catholic War Veterans had threatened to picket, but since the Concourse Plaza had a contract with us, the affair was held and we had a successful concert.

The full effect of the Attorney General's list became apparent when, on January 19, 1948, the Concourse Plaza was called for a small room for a meeting. Mr. Lynch, assistant manager of the Banquet Department, said, "Just a minute"; then he returned several minutes later and said they were no longer going to rent to us because we were on the "loyalty list", and were a "subsidiary organization". We have been thereafter unable to rent space from that hotel.

The plain fact is that even the short time which has elapsed since December 4, 1947 demonstrates the urgency for relief by this Court. The tide which has been unloosed

by the Attorney General's list threatens the imminent destruction of the Joint Anti-Fascist Refugee Committee. Only a judicial determination of the unconstitutionality of the acts of the defendants can serve to mitigate and, possibly, eradicate the effects of Executive Order #9835 and the legislation from which it stems. The immediate and irreparable harm to the Joint Anti-Fascist Refugee Committee caused by the acts of the defendants, and the unconstitutionality of those acts, should compel this Court [fol. 34] to grant the Joint Anti-Fascist Refugee Committee the temporary injunction it seeks.

Helen R. Bryan.

Sworn to before me this 9th day of February, 1948.
David Berger, Notary Public, State of New York.
Residing in Westchester County. Cert. filed in
N. Y. Co. No. 791, Reg. No. 634-B-9. Commission
expires March 30, 1949.

[fol. 34] IN UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT—Filed
March 13, 1948

Now come the defendants and move the Court to dismiss this action on the grounds that:

1. There is no present justiciable controversy between the parties hereto;
2. The complaint fails to state a claim against the defendants upon which relief can be granted.

In support of this motion, the Court is respectfully referred to defendants' supplemental memorandum of points and authorities attached hereto.

H. G. Morison, Assistant Attorney General; George Morris Fay, United States Attorney; Edward H. Hickey, Special Assistant to the Attorney General.

[fol. 35] IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO DISMISS—Filed June 4, 1948

And Now, this 4th day of June, 1948, this matter having come on for hearing upon the plaintiff's motion for a pre-

liminary injunction and the defendants' motion to dismiss the complaint; and the Court herein having considered the affidavits, exhibits, and memoranda of points and authorities submitted by the parties and the arguments of counsel; and thereupon it is Ordered, Adjudged, and Decreed:

First: That the motion of the defendants to dismiss the complaint be and it is hereby granted; and that the complaint be and hereby is dismissed.

Second: That the plaintiff's motion for a preliminary injunction be and it is hereby denied.

F. Dickinson Letts, Justice.

Seen: O. John Rogge, Attorney for Plaintiff; Edward H. Hickey, Special Assistant to the Attorney-General, Attorney for Defendants.

[fol. 36] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant

v.

TOM C. CLARK, Attorney General of the United States, et al.,
Appellees

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia).

Argued March 16, 1949. Decided August 11, 1949

Mr. O. John Rogge, with whom *Messrs. Murray A. Gordon* and *Robert H. Goldman* were on the brief, and *Mr. Benedict Wolf*, for appellant.

Mr. Edward H. Hickey, Special Assistant to the Attorney General with whom *Messrs. H. G. Morison*, Assistant Attorney General, *George Morris Fay*, United States Attorney, and *Richard E. Guggenheim*, Attorney, Department of Justice, were on the brief, for appellees.

Messrs. Carl W. Berueffy, *Osmond K. Fraenkel* and *James L. Fry* were on the brief for the American Civil Liberties Union as *amicus curiae*, urging reversal.

Before Edgerton, Clark and Proctor, JJ.

OPINION

PROCTOR, J.; This appeal is from an order of the District Court dismissing the complaint of the Joint Anti-Fascist Refugee Committee, appellant, (an unincorporated association alleged to be engaged in raising and distributing funds for relief of anti-fascist refugees) hereafter referred to as Committee, against Tom C. Clark, as Attorney General of the United States, Seth W. Richardson, as Chairman of the Loyalty Review Board of the United States Civil Service Commission, and other named members of said Board, hereafter referred to as Board.

The complaint is based upon the action of the Attorney General, without notice or hearing, in designating the Committee as an organization falling under Part III, Section 3, of Executive Order 9835 (12 Fed. Reg. 1935, March 21, 1947), and listing its name as such in a letter to the Board, and the action of the Board in distributing the letter [fol. 37] and list to departments and agencies in the executive branch of the Government and releasing the same to the public press. The foregoing steps were taken pursuant to directions of the President in said Executive Order 9835. The declared purpose of this order is to assure the employment of persons loyal to the United States. To that end it prescribes detailed procedures for the administration of an employees loyalty program in the executive branch of the Government, involving investigation of officers and employees therein and applicants for employment. The order recites that it is based upon authority vested in the President by the Constitution and statutes, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and Section 9A of the Hatch Act, approved August 2, 1939 (18 U. S. C. 61i, now 5 U. S. C. 118j) and by authority of the President as Chief Executive of the United States, in the interests of the internal management of the Government. Section 9A of the Hatch Act provides:

"(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress; to have membership in any political party or organization which advocates the overthrow of our Constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

Part III, Section 3, of the order provides that the Board shall currently be furnished by the Department of Justice with the name of each organization "which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." By subsection "a" Part III, Sec. 3, the Board is directed to "disseminate such information to all departments and agencies." The order further provides that among activities and associations of an applicant or employee, which may be considered in determining disloyalty, are membership in, affiliation with or sympathetic association with any of the organizations designated by the Attorney General. (Executive Order 9835, Part V, Sec. 2, f.) In his letter to the Board the Attorney General, in designating the Committee classified it under Part III, Section 3, of the Executive Order. For brevity, we refer to the several groups indicated therein under the general term "subversive," although the Attorney General did not specifically so designate the Committee. In the foregoing letter, the Attorney General reiterates an admonition by the President that membership in or association with a designated organization "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case." The complaint contains no express denial that the Committee falls within the designation made by the Attorney General. In view of the extraordinary relief sought by way of equity a denial would seem to be appropriate. This is, in no sense, a simple action for libel.

The gist of the complaint is that Section 9A of the Hatch Act, "as applied by" the Executive Order, and the order itself are unconstitutional, and that the actions of the At-

torney General in designating and listing the Committee as subversive, and of Richardson in disseminating and publishing the list have caused the Committee to suffer loss of reputation and "business and patronage," including contributions from former and potential contributors, especially present and prospective civil servants; also to be deprived of its tax exempt status as a charitable organization; to be refused necessary licenses to solicit funds; to be hampered in obtaining places and supporters to carry on its fund-raising activities, and its "members and others" to be disgraced to their "economic injury," and discouraged in continuing their activities in its behalf, all to its irreparable damage. Those are the only direct allegations of damage or loss of rights suffered by the Committee. Nevertheless the complaint goes on to charge that the foregoing actions of defendants were "without warrant in law and amount to a deprivation of the rights of the plaintiff in violation of the Constitution . . ." and that Section 9A of the Hatch Act is void as applied by Executive Order 9835, because a deprivation of freedom of speech, of the press and of assembly and "association" (1st Amendment), of reserved rights of the people (9th and 10th Amendments) and of liberty and property without due process of law (5th Amendment). Wherefore, the Committee seeks a judgment declaring Section 9A of the Hatch Act, "as applied by Executive order #9835," and the order itself, to be unconstitutional; also for broad injunctive relief to annul the alleged illegal acts of the Attorney General and the Board and overcome their ill effects. The motion to dismiss is laid upon the ground that the complaint fails to state a justiciable controversy or a claim upon which relief can be granted.

We are convinced that the complaint does not present a justiciable controversy. The Executive Order imposes no obligation or restraint upon the Committee. It commands nothing of the Committee. It denies the Committee no authority, privilege, immunity or license. It subjects the Committee to no liability, civil or criminal. Cf. *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 310, 71 L. Ed. 651 (1927). Nor does the designation by the Attorney General have any such effect. His letter to the Board simply complies with the directions of the President in whose behalf he was acting. He has done for the President only that which the President could have done for himself. Had the President done so his action would have

been within the realm of his executive power, not subject to judicial review. *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 164-166, 2 L. Ed. 60 (1803); *Keim v. United States*, 177 U. S. 290, 293, 44 L. Ed. 774 (1900); *Humphrey's Executor v. United States*, 295 U. S. 602, 629-630, 79 L. Ed. 1611 (1935).

The letter of the Attorney General and his list of designated organizations were furnished the Board only by way of information and advice. That is made clear by the terms of the Executive Order and the letter of the Attorney General. They cannot be put in the category of laws or [fol. 39] regulations within the meaning of constitutional prohibitions against abridgment of the rights of the people. The case is much like that of *Standard Scale Company v. Farrell*, 249 U. S. 571, 63 L. Ed. 780 (1919), where an injunction was sought against issuing certain scale specifications, injurious to plaintiff's business, upon the claim that it would constitute an invalid exercise of police power and violate constitutional rights and privileges. In upholding dismissal of the bill, the Court says (p. 575):

"The information given in the 'specifications' complained of may, as the plaintiff contends, be incorrect, the instruction may be unsound, and, if it is so, may be mischievous and seriously damage the property rights of innocent persons. But the opinions and advice, even of those in authority, are not a law or regulation such as comes within the scope of the several provisions of the Federal Constitution designed to secure the rights of citizens as against action by the States."

See also *United States v. Los Angeles & S. L. R. Co.*, *supra*. In *Employers Group, etc., v. National War Labor Board*, 143 F. 2d 145, 79 U. S. App. D. C. 105 (1944), where it was sought to annul and enjoin a "directive order" of said Board, this court, speaking through Judge Edgerton, said:

"No money, property, or opportunity has been taken or withheld from the appellants, and no one threatens any such act. No one threatens, and no one could maintain, either judicial or administrative proceedings against the appellants upon the authority of the Board's order." (p. 147)

"Any action of the Board would be informative and 'at most, advisory.' Appellants' demand that we annul and enjoin the Board's order therefore amounts to a demand that we prevent the Board from giving the President advice which appellants contend would be erroneous. A court might as well be asked to prevent the Secretary of State or the Attorney General from giving alleged erroneous advice. The correctness of administrative advice cannot be reviewed by the courts. They have neither the necessary authority nor the necessary qualifications for such work." (p. 151)

citing *Standard Scale Company v. Farrell*, *supra*. See also *National War Labor Board v. United States Gypsum Co.*, 145 F. 2d 97, 79 U. S. App. D. C. 239 (1944).

At most, any injury to the Committee is indirect—purely incidental to the objects and purposes of the loyalty program. Under these circumstances neither the Attorney General nor the Board can be restrained from carrying out the directions of the President looking to distribution of the information to interested departments and agencies—steps essential in carrying out the program.

The complaint that the information was disclosed to the public press presents no legal ground for relief. In the absence of a statute imposing secrecy, it cannot be supposed that the courts have any power to regulate or control publication of matters concerning the government's business. The responsibility and decision in each case must rest with the official in charge.

[fol. 40] The contention that without a hearing in connection with the Attorney General's investigation and determination the Committee has been denied due process of law, disregards the purpose and effect of the Executive Order and the action of the Attorney General. They were not aimed at the Committee, but were necessary steps in executing the law and carrying out the loyalty program. It is not unusual for official action, intended for one purpose, to affect adversely others against whom it is not directed. But these unavoidable consequences cannot stay the hand of government. They afford no ground for judicial review. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 84 L. Ed. 1108 (1940); *Ex-Cell-O Corp. v. City of Chicago*, 115 F. 2d 627 (C. C. A. 7th 1940).

If the Committee means to assert claims in behalf of its members reputedly disgraced by reason of the designation, it is enough to point out that only the members themselves are entitled to complain of any personal injuries they may suffer. Likewise, only the members, not the Committee, can seek redress for alleged impairment of members' constitutional rights of freedom of speech and assembly. Those rights are personal to the individual members. Cf. *Hague v. C. I. O.*, 307 U. S. 496, 527, 83 L. Ed. 1423 (1939); *Northwestern Life Ins. Co. v. Riggs*, 203 U. S. 243, 255, 51 L. Ed. 168 (1906); *Western Turf Assn. v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520 (1907). The Committee's declared purposes are altogether charitable, which would give it no authority to assert or protect constitutional liberties and privileges of its individual members.

Obviously, nothing here complained of legally affects the tax or licensing status of the Committee. No declaration or mandate in this case could operate legally upon such matters. The Committee's recourse lies with the officials or the courts clothed with power to grant direct relief.

Holding, as we do, that no case has been stated for injunctive relief, it follows in the circumstances presented by the complaint that there is no ground to justify a declaratory judgment such as the Committee asks. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 262, 77 L. Ed. 730 (1933); *Colegrove v. Green*, 328 U. S. 549, 552, 90 L. Ed. 1432 (1946).

We might rest our opinion here, without dealing with the constitutional questions raised. However, in view of the number of cases in this jurisdiction attacking validity of the loyalty program, it seems proper to dispose of questions of that nature which have been argued in this case. Therefore, we shall briefly state our views.

We do not doubt validity of Section 9A of the Hatch Act. Congress may prescribe qualifications of government employees and attach conditions to their employment. *Friedman v. Schwellenbach*, 159 F. 2d 22, 24, 81 U. S. App. D. C. 365 (1946), cert. denied 330 U. S. 838.

We do not doubt validity of the Executive Order. It is the President's duty to take care that the laws are faithfully executed. *Article II, Section 3, Constitution*. It is his right and his duty to protect and defend the government against subversive forces which may seek to change or destroy it by unconstitutional means. Vesting of the

executive power in the President is essentially a grant of power to execute the laws. He cannot do so alone. He must have the aid of subordinates. Therefore, he must have the power to select others to act for him, under his direction, in executing the laws. *Myers v. United States*, [fol. 41] 272 U. S. 52, 117, 71 L. Ed. 160 (1926). The Executive Order exhibits a proper effort by the President to carry out the provisions of Section 9A. It is an exercise of his power as head of the executive branch of government to protect the civil service from disloyal and subversive elements. See Corwin, *The President—Office and Powers*, 3rd Ed. (1948), 121-136. His directions contained in the Executive Order lay down the method he has chosen to discharge his duty in carrying out the objects and purposes of Section 9A and the Civil Service Act.

We do not doubt validity of the Attorney General's Act. Had the President performed the task himself, his acts could not have been challenged legally. *Marbury v. Madison*; *Keim v. United States*; *Humphrey's Executor v. United States*, *supra*. The fact that they were done by the Attorney General, for and at the President's direction, does not change their essential character as acts of the President himself.

Contrary to the contentions of the Committee, nothing in the Hatch Act or the loyalty program deprives the Committee or its members of any property rights. Freedom of speech and assembly is denied no one. Freedom of thought and belief is not impaired. Anyone is free to join the Committee and give it his support and encouragement. Everyone has a constitutional right to do these things, but no one has a constitutional right to be a government employee.

The order of the District Court dismissing the complaint is affirmed.

DISSENTING OPINION

EDGERTON, J., dissenting: The facts have not been tried and we know nothing about them. Appellant may be charitable as it says or subversive as appellees' ruling says. By moving to dismiss appellant's complaint on the ground it did not state a justiciable controversy or a claim on which relief could be granted, appellees elected to try only

the sufficiency and not the truth of appellant's statements of fact. Since the District Court granted the motion to dismiss, appellant's statements must be assumed to be true for purposes of this appeal. No other facts are before us.

According to appellant's complaint: "Plaintiff, an unincorporated association located in the City and State of New York, is a charitable organization engaged in relief work. . . . The aims and purposes of the plaintiff organization are to raise, administer and distribute funds for the relief and rehabilitation of Spanish Republicans in 'exile and other anti-fascist refugees who fought in the war against Franco. Before the end of the war in Europe, this relief consisted of: (1) the release and assistance of those of the aforesaid refugees who were in concentration camps in Vichy France, North Africa and other countries; (2) transportation and asylum for those of the aforesaid refugees in flight; (3) direct relief and aid, to those of the aforesaid refugees requiring help, through the Red Cross and other international agencies. At the present time, the Joint Anti-Fascist Refugee Committee relief work is principally devoted to aiding those Spanish Republican refugees, and other anti-fascist refugees who fought against Franco, located in France and Mexico. Pursuant to its aims and purposes, the plaintiff organization has, from its inception in 1942 through the end of 1947, disbursed a [fol. 42] total of \$1,011,448.00 in cash and \$217,903.00 in kind for the relief of anti-fascist refugees and their families. The relief included money, food, shelter, educational facilities, medical treatment and supplies, and clothing to recipients in France, North Africa, the Dominican Republic, Portugal, Switzerland, Cuba, Venezuela, Mexico, the Netherlands, Spain and the United States.

"By means of voluntary and paid assistance, the plaintiff organization has raised funds from contributors at social affairs, rallies, meetings, dinners, theatre parties, etc. In order to carry on the aforesaid work, plaintiff has built up and is dependent upon the continued good will of the people of the United States and upon the continued maintenance of its reputation of engaging in relief work for the benefit of anti-fascist refugees."

According to the complaint: the appellees, purporting to act under an Executive Order, have issued for the guidance of government officials in employing and discharging

employees a ruling that the appellant is "subversive".¹ They issued this ruling without giving appellant any notice or hearing. They gave it wide publicity. It has caused appellant to lose reputation, members, supporters, contributions from government employees and others, valuable privileges, speakers, and meeting places. It has caused appellant's members to be subjected to ridicule, obloquy and economic loss.

However indefinite the word "subversive" may be, it is more or less synonymous with "disloyal". It is highly defamatory. No common meaning of the term fits the appellant if the appellant's "aims and purposes" are what it says they are. In other words, if the complaint is true the appellant is not subversive. Whatever the actual facts may ultimately prove to be, it must be assumed for purposes of this appeal that appellees' ruling is not only damaging but contrary to fact.²

¹ The official announcement in 13 Fed. Reg. 1471, 1473, March 20, 1948, says: "The first group [of organizations] is reported as having been previously named as subversive by the Department of Justice . . . Under Part III, section 3, of Executive Order No. 9835, the following additional organizations are designated. . . . Joint Anti-Fascist Refugee Committee."

Some months after this suit was filed, appellees issued and published a ruling that appellant is "communist". 13 Fed. Reg. 6137, Oct. 21, 1948.

² It is immaterial that, as the opinion of the court points out, the complaint "contains no express denial that the Committee falls within the designation." If the complaint did not, as it does, contain a denial by necessary implication, that also would be immaterial. No complaint based on defamatory words need allege that the words are false; it is for the defendant to allege and prove, if he can, that they are true. And regardless of the nature of the suit, things not asserted or admitted in the complaint cannot be treated as true on the present appeal even if they are not denied in the complaint.

If appellees had described appellant as "totalitarian, fascist, communist, or subversive . . .," and not specifically as "subversive", the difference would be immaterial, since either description is defamatory and, on this record, contrary to fact.

I. *The Executive Order.* Executive Order No. 9835³ on which appellees rely, provides in Part V that: "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

[fol. 43] "2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following: . . . f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." 12 Fed. Reg. 1935, 1938.

An organization of the aims and purposes asserted in the complaint is not "subversive" within the meaning of that term in the Executive Order. Whatever it means in other connections, in this connection the term describes organizations "sympathetic association" with which may be evidence "that the person involved is disloyal to the Government of the United States." Advocacy of revolution is disloyal to the government. Greater or equal loyalty to a foreign government is disloyal to the government of the United States. Nothing less is. Helping former Spanish Republicans is not evidence of disloyalty to the government of the United States.⁴ A charitable organization such as the appellant must now be assumed to be is therefore not subversive in the sense in which the word is used in the Executive Order. Neither is it "totalitarian, fascist, communist, . . ." or otherwise within the Order. On the present record, the Order does not justify appellees' ruling.

³ 12 Fed. Reg. 1935 (1947).

⁴ It does not even oppose any known policy of the government. There is, moreover, nothing disloyal to the government in opposition to a known government policy. Practically any given government policy is opposed by many members of Congress.

The Order fails for another reason to justify the ruling. The Order provides (Part III, § 3) that "The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, *after appropriate investigation* and determination, designates as totalitarian, fascist, communist or subversive . . ."⁵ (Emphasis added.) An investigation that may result in the making and publication of a defamatory ruling which limits employment throughout the government service, limits the freedom of government employees, and harms not only the appellant but many persons outside as well as within the service, is not appropriate unless it conforms to basic standards of fairness. These include notice and a hearing. If the complaint is true, appellant was given none.

Appellees' ruling is not only outside the Executive Order but outside the authority on which the Order is said to rest. Section 9A of the Hatch Act, 53 Stat. 1148, 18 U. S. C. 61 i, forbids employment of members of an organization that "advocates the overthrow of our constitutional form of government in the United States." If the facts alleged in the complaint are true the appellant is not such an organization. The Civil Service Act, R. S. § 1753, 5 U. S. C. 631, authorizes the President to "prescribe such regulations for the admission of persons into the civil service of the [fol. 44] United States as may best promote the efficiency thereof . . ." On the present record, appellees' ruling against appellant has no more tendency to promote the efficiency of the civil service than a similar ruling against the Republican party or the Methodist Church would have.⁶ Moreover, the ruling is invalid on constitutional grounds.

II. *Due process of law.* Arbitrary official action that inflicts damage takes liberty or property without due process of law. On this record, appellees' ruling is arbitrary because it is contrary to fact, because it is not authorized by law or Executive Order, because it has no tendency to benefit

⁵ *Supra* note 3, at 1938.

⁶ Since the ruling is not authorized by the Order, and is invalid for other reasons, we need not consider whether in our opinion the Order is valid; or whether the Administrative Procedure Act required a hearing.

the public service, and because it was made without notice and hearing.

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U. S. 257, 273. These rights are not confined to proceedings in courts. In the *Morgan* case, which the Supreme Court cited as "among the multitude that support" the statement just quoted, the plaintiffs attacked an order of the Secretary of Agriculture fixing rates to be charged by market agencies. The Court said "the rudimentary requirements of fair play . . . demand 'a fair and open hearing'." *Morgan v. United States*, 304 U. S. 1, 14-15.

We were recently reminded that "due process of law has never been a term of fixed and invariable content. . . . The right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, 337 U. S. 265. "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Betts v. Brady*, 316 U. S. 455, 462. What is practically necessary may be reasonably fair, and what is reasonably fair may be due process. It is not practical to require a public official to hold a hearing before he makes a casual damaging statement. But it is neither fair nor necessary to enact and publish a defamatory permanent regulation restricting eligibility for public employment, restricting the freedom of government employees, and inflicting damage on many persons, without giving the accused group an opportunity to be heard in its defense. The same circumstances that make the Attorney General's investigation less than appropriate make it less than due process of law.

III. *Freedom of speech and assembly.* Read literally, the First Amendment of the Constitution forbids only Congress to abridge these freedoms. But as the due process clause of the Fourteenth Amendment extends the prohibition to all

state action, the due process clause of the Fifth must extend it to all federal action.⁷

[fol. 45] According to the complaint, appellant uses meetings and speakers in raising funds. Appellees' ruling, in its context, is a public warning that sympathetic association with appellant may cause government employees to be dismissed. It therefore puts government employees, present and prospective, under economic and social pressure not to support any of appellant's activities, verbally or otherwise, and in particular to stay away from appellant's meetings. In other words the ruling restricts the freedom of speech and assembly of government employees. According to the complaint, the ruling has deprived appellant of speakers and meeting places as well as supporters and funds. In other words it has restricted appellant's freedom of speech and assembly. To restrict appellant is to restrict the members who compose it.

The Supreme Court has repeatedly held that restrictions on freedom of expression are not valid in the absence of a clear and present danger.⁸ There is no evidence of such a danger in this case. In the *Mitchell* case the Court held that "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."⁹ But if appellant's purposes are truly stated in the complaint, sympathetic association with appellant cannot reasonably be deemed to interfere with the efficiency of the public service. It follows that if, as we must

⁷ This was implied in *United Public Workers v. Mitchell*, 330 U. S. 75, 94-95.

⁸ The Court reaffirmed this doctrine in *Terminiello v. City of Chicago*, 337 U. S. 1.

⁹ *United Public Workers v. Mitchell*, 330 U. S. 75, 101. The Court upheld a particular restraint on the freedom of government employees to promote their political views but said (p. 100): "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on congressional power."

now assume, the complaint is true, the restraint imposed upon government employees, and not merely that imposed upon appellant and its members, is unconstitutional.

Executive power to control public employment stands on no higher constitutional ground than legislative power to tax. The taxing power does not extend to sales of propaganda not made for profit; license taxes, though imposed for the legitimate purpose of raising revenue, are unconstitutional in their application to such sales.¹⁰ Such taxes, even if they are too small to be a "substantial clog"¹¹ on the circulation of propaganda, are "on their face . . . a restriction of the free exercise of those freedoms which are protected by the First Amendment."¹² The threat to reputation and livelihood that appellees' ruling imposes is on its face a greater restriction of the free exercise of those freedoms than the small license taxes the Supreme Court held void. It is a substantial clog. It is therefore more clearly unconstitutional than the taxes.

[fol. 46] IV. *Standing to sue.* Appellant, an unincorporated association,¹³ has standing to sue for the claimed injury to its reputation.¹⁴

¹⁰ *Jones v. City of Opelika*, 319 U. S. 103; *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105; *Busey v. District of Columbia*, 319 U. S. 579; *Busey v. District of Columbia*, 78 U. S. App. D. C. 189, 138 F. 2d 592.

¹¹ *Jones v. City of Opelika*, 316 U. S. 584, 604. The dissent of Chief Justice Stone and the other dissents filed at the same time were afterwards adopted as opinions of the Court. *Jones v. City of Opelika*, 319 U. S. 103, 104.

¹² *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105, 114.

¹³ An unincorporated association may sue in its common name. *Busby et al. v. Electric Utilities Employees Union*, 79 U. S. App. D. C. 336, 147 F. 2d 865; Rule 17(b), Fed. R. Civ. P.

¹⁴ *Kirkman et al. v. Westchester Newspapers*, 287 N. Y. 373, 39 N. E. 2d 919. Cf. *New York Society for the Suppression of Vice v. MacFadden Publications*, 260 N. Y. 167, 183 N. E. 284, 86 A. L. R. 440.

It is too late to say that equity does not protect personal rights *Berrien v. Pollitzer*, 83 U. S. App. D. C. 23, 165 F. 2d 21.

Appellant has standing to sue for the claimed impairment of its freedom of speech and assembly.

Appellant has standing to sue for its claimed loss of contributions. Even a charity, which appellant claims to be, cannot operate without funds. In *Pierce v. Society of Sisters* private schools, some of them charitable, got relief because a state law requiring children to attend public schools caused the plaintiffs to lose tuition fees. "Their interest is clear and immediate, within the rule approved in *Truax v. Raich* . . . and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers." *Pierce v. Society of Sisters*, 268 U. S. 510, 536. In *Truax v. Raich*, 239 U. S. 33, enforcement of a state law restricting the right of employers to hire aliens but not the right of aliens to work for hire was enjoined at the suit of an alien. In *Buchanan v. Warley*, 245 U. S. 60, an ordinance forbidding Negroes to move into white neighborhoods was set aside at the suit of a white man who wished to complete a sale to a Negro. In each case an unconstitutional interference with persons other than the plaintiff was enjoined because it put pressure on them to sever, or not to create, relations of value to him. Similarly the unconstitutional pressure of appellees' ruling upon present and prospective government servants has injured appellant by depriving it of contributions. Its relations with its contributors were terminable at will, but so were the relations involved in the *Pierce* and *Truax* cases.

Columbia Broadcasting System, Inc. v. United States, 316 U. S. 407, is in some respects still closer to this case. The Columbia network sued to set aside a Communications Commission regulation against renewing the licenses of broadcasting stations that had certain kinds of contracts with networks. The regulation, like the one now in suit, did not command or forbid any action, either by the plaintiff or by the plaintiff's affiliates. The regulation was "addressed only to the Commission." (p. 419) But it injured Columbia by putting stations affiliated with Columbia to the sort of choice to which appellees' ruling puts government employees affiliated with appellant; the stations could cancel their contracts or lose their licenses, as the employees can cancel their affiliations or endanger their jobs. The Supreme Court held that Columbia had standing to sue. It said (pp. 417, 418): "The regulations are

not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. . . . The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more." The regulation now in suit is a rule which authorizes dismissal of employees on the grounds specified in the Executive Order.

Threatened publication by government officers of damaging information about a plaintiff, even when its truth is [fol. 47] conceded, gives him standing to test the propriety of the publication.¹⁵ There would seem to be no less standing where, as here, truth is not conceded and continuance rather than the first occurrence of the publication is threatened.¹⁶

V. *Liability to suit.* "Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, . . . courts have the power to grant relief against those actions."¹⁷ Equitable jurisdiction extends to cabinet officers.¹⁸ The theory that an officer who is or claims to be executing an order of the President cannot be restrained would end due process of law and

¹⁵ *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56; *Bank of America National Trust & Savings Association v. Douglas*, 70 App. D. C. 221, 105 F. 2d 100.

¹⁶ The question whether government employees whom the ruling threatens with dismissal have standing to sue for that reason, cf. *United Public Workers v. Mitchell*, *supra* note 9, is not before us, for no employees are suing. It does not appear that any of appellant's members are government employees, although the complaint says appellant's "contributors" include "civil servants".

¹⁷ *Larson v. Domestic and Foreign Commerce Corp.*, U. S. , decided June 27, 1949. *Belt v. Hood*, 327 U. S. 678, 684; *Land v. Dollar*, 330 U. S. 731; *United States v. Lee*, 106 U. S. 196.

¹⁸ *Eg., Philadelphia Company v. Stimson*, 223 U. S. 605; *Ickes v. Fox*, 300 U. S. 82, 96-97; *Red Canyon Sheep Co. v. Ickes*, 69 App. D. C. 27, 98 F. 2d 308.

subject all life, liberty, and property to the will, or alleged will, of one man.

Cabinet officers are not liable in damages for statements made in connection with official duties, for they should be under no apprehension that personal harm might result from saying what they think they should say.¹⁹ But their liability in equity causes no such apprehension. No claim for injunctive or declaratory relief was involved in the *Spalding* and *Glass* cases on which appellees rely. No claim for damages is involved in this case.

The rule of *Standard Scale Co. v. Farrell*, 249 U. S. 571, that mere administrative advice cannot be reviewed by a court, is equally irrelevant here. Standard manufactured scales that did not agree with "specifications" published by a state Superintendent of Weights and Measures. Standard's bill to set aside the specifications was dismissed. No law or order required any inspector, purchasing officer, or other person to treat the specifications as correct; they were (p. 574) "at most, advisory." But Executive Order No. 9835 requires all loyalty boards to treat as correct appellees' ruling that appellant is subversive.²⁰ On March 9, 1948, the appellee Chairman of

¹⁹ "The head of a Department . . . cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority . . . In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages . . ." *Spalding v. Vilas*, 161 U. S. 483, 498. *Glass v. Ickes*, 73 App. D. C. 3, 117 F. 2d 273, cert. denied 311 U. S. 718, followed *Spalding v. Vilas*.

²⁰ Cf. *Shields v. Utah-Idaho Central Ry. Co.*, 305 U. S. 177, 182-184.

Additional differences between the *Standard Scale* case and the present one are (1) it was not even alleged there, and is admitted here, that the defendants acted without giving the plaintiff notice or hearing; (2) the complaint there was not dismissed until evidence had been taken, and this included proof that the specifications were "the

[fol. 48] the Loyalty Review Board called this fact to the attention of all executive departments and agencies.²¹

Employers Group of Motor Freight Carriers v. War Labor Board, 79 U. S. App. D. C. 105, 143 F. 2d 145, cert. denied 323 U. S. 735, applied the rule of the *Standard Scale* case. We declined to set aside a "directive order"

result of prolonged investigation and extensive experimentation"; (3) the specifications did not name the plaintiff but were "generic"; (4) no question of freedom of speech or assembly was involved.

Although the evidence, if any, of unreasonable or arbitrary action was obviously weak in the *Standard Scale* case the Court said: "If the 'specifications' had been issued as a regulation, that is, a law, we might have been called upon to inquire whether it was a proper exercise of the police power or was, as plaintiff contends, void because arbitrary and unreasonable." *Standard Scale Co. v. Farrell*, 249 U. S. 571, 577.

²¹ Two paragraphs of his Memorandum No. 2, which is addressed "To All Executive Departments and Agencies", follow:

"Since the loyalty program is being conducted under the authority of the executive order, and since the President under such order has constituted the Attorney General the agency for the creation and submission of a list of groups or organizations of the nature defined in Part V, subdivision f, of the executive order, the determination as to the nature of such organizations thus made by the Attorney General under the authority and direction of the President, must be accepted by all Boards for the purpose of all hearings and determinations under the loyalty program.

"Boards, therefore, should not enter upon any evidential investigation of the nature of any of the organizations identified in the Attorney General's list, for the purpose of attacking, contradicting, or modifying the controlling conclusion reached by the Attorney General in such list. Any and all questions proposed with respect to the merits or appropriateness of the inclusion of a particular organization in such list would, therefore, be for the Attorney General to decide, and not for the Board, and the Board should permit no evidence or argument before it on the point."

that amounted only to a statement that the Board thought the Carriers should grant certain wage increases. The Board's views were not enforceable against anybody,²² were not defamatory, and caused no loss. The ruling now in suit is defamatory; unless it is set aside, it is enforceable against appellant's supporters who are government employees; and it has caused loss.

Appellees' ruling is said to be a mere matter of internal management. Even in such matters the Constitution governs.²³ But there was nothing internal about the publication of the ruling. It was chiefly this publication that injured the appellant and its members and restricted the freedom of government employees. The right to hire and fire is not a right to broadcast statements that appellant, and so the members who compose it, are criminals or that they are subversive.

If the assertions of fact in the complaint are true the appellees' ruling is contrary to fact, unauthorized, and unconstitutional, and the appellant is entitled to relief against the appellees. The judgment dismissing the complaint should therefore be reversed.

²² The carriers suggested that the Board might notify the President of the plaintiffs' noncompliance with the Board's views and the President might take possession of the plaintiffs' property. But nothing the Board could say to the President could determine whether the Carriers should grant the proposed wage increases, or whether their property should be seized, or any other question. The President had full authority under his war powers to take possession of the plaintiffs' property or not to do so, whether or not he agreed with the Board's views, whether or not the Carriers complied with the Board's views, and whether or not the Board reported to the President. Any action the Board might take would therefore be merely advisory.

²³ Cf. *United Public Workers v. Mitchell*, *supra* note 9.

[fol. 49] [Stamp:] United States Court of Appeals for the District of Columbia, Circuit. Filed Aug. 11, 1949. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1949

No. 10002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, AN UNINCORPORATED ASSOCIATION, Appellant,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, Seth W. Richardson, Chairman of the Loyalty Review Board of the United States Civil Service Commission, et al., Appellees

Appeal from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia.

Before: Edgerton, Clark and Proctor, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Proctor.

Dated August 11, 1949.

Dissenting opinion by Circuit Judge Edgerton.

[fol. 50] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 14, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1949

No. 10,002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant,

v.

TOM C. CLARK, ET AL., Appellees

ORDER

On consideration of the appellant's motion to substitute J. Howard McGrath, present Attorney General of the United States, as a party appellee herein in the place and stead of appellee Tom C. Clark, who ceased to hold office as Attorney General of the United States on or about August 24, 1949, and it appearing to the Court that J. Howard McGrath, present Attorney General of the United States, consents to the said substitution, and appellant having alleged that J. Howard McGrath, present Attorney General of the United States, adopts and continues the actions of appellee Clark complained of in this cause and having alleged that there is substantial need for continuing and maintaining this cause and obtaining adjudication of the questions involved, It is

Ordered by the Court that J. Howard McGrath, Attorney General of the United States, be, and he is hereby, substituted as a party appellee herein in the place and stead of appellee Tom C. Clark.

Per curiam.

Dated October 14, 1949.

[fol. 51] PETITION FOR REHEARING—[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Aug. 26, 1949. Joseph W. Stewart, Clerk

[fol. 52] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Sep. 22, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1949

No. 10,002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,
ET AL., Appellees

Before: Edgerton, Clark and Proctor, JJ.

ORDER

On consideration of appellant's petition for rehearing in the above-entitled case and of appellees' objections thereto, It is

Ordered by the Court that the petition be, and it is hereby, denied.

Per Curiam.

Dated September 22, 1949.

[fol. 53] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 9, 1949. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Index No. 10,002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant,
against

TOM C. CLARK, ET AL., Appellees

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the

United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix to briefs.
2. Opinion.
3. Judgment.
4. Order to substitute J. Howard McGrath for appellee Tom C. Clark.
5. Clerk's memorandum of filing of petition for rehearing.
6. Order denying petition for rehearing.
7. This designation.
8. Clerk's certificate.

Rogge, Fabricant, Gordon & Goldman, By G. John Rogge, Attorneys for Appellant, 401 Broadway, New York 13, N.Y.

[fol. 54]

CERTIFICATE OF SERVICE

I hereby certify that I have ~~this day~~ served a copy of the Designation of Record on Philip B. Perlman, Solicitor General of the United States, by mailing a copy to him at his office, Department of Justice, Washington, D. C.

O. John Rogge.

Dated at New York, N. Y., this 8th day of December, 1949.

[fol. 55] UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 54, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals, as designated by counsel, in the case of:

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant,

v.

TOM C. CLARK, ET AL., Appellees

No. 10,002, October Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fourteenth day of December, A.D. 1949.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

[fol. 56] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1949

No. —

JOINT ANTI-FASCIST REFUGEE COMMITTEE, AN UNINCORPORATED
ASSOCIATION, Petitioner,

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED
STATES, ET AL.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 25, 1950.

Fred M. Vinson, Chief Justice of the United States.

Dated this 12 day of December, 1949.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas and Mr. Justice Clark took no part in the consideration or decision of this application.

(7546)

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IN THE
Supreme Court of the United States

OCTOBER TERM ~~1949~~ 1950

No. ~~553~~ 8

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
an unincorporated association,

Petitioner,

v.

J. HOWARD McGRATH, Attorney General
of the United States, *et al.*,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA AND BRIEF IN SUPPORT THEREOF**

**O. JOHN ROGGE,
BENEDICT WOLF,**
Attorneys for Petitioner.

**MURRAY A. GORDON,
ROBERT H. GOLDMAN,
JEROME J. BORNSTEIN,**
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM—1949

No.

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
an unincorporated association,

Petitioner,

v.

J. HOWARD McGRATH, Attorney General
of the United States, *et al.*,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA**

*To the Honorable the Chief Justice of the Supreme Court
and the Associate Justices of the Supreme Court of
the United States:*

The petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia affirming the dismissal of the complaint and the denial of petitioner's motion for a preliminary injunction by the United States District Court for the District of Columbia.

Statement of the Matter Involved

The instant action was brought for declaratory and injunctive relief by the Joint Anti-Fascist Refugee Committee (hereinafter sometimes referred to as "JAFRC"), an unincorporated association located in New York City, N. Y., against Tom C. Clark, Attorney General of the United States,* Seth W. Richardson, Chairman of the Loyalty Review Board of the Civil Service Commission, and the rest of the members of that Board. Respondents were named in their capacity as individuals. Petitioner sought to remedy and enjoin the action of respondents taken pursuant to Executive Order 9835, the so-called "Loyalty Order," which the petitioner declares to be unconstitutional.

The first cause of action alleges that the JAFRC has conducted relief activities, under governmental supervision (R. 3), since its inception in 1942, for the benefit of anti-fascist refugees who had fought with and assisted the duly constituted Government of Spain in its opposition to the efforts of Francisco Franco to overthrow that Government by armed force (R. 4). The JAFRC assisted in the release of such refugees from concentration camps and arranged for their transportation, asylum and other aid; and at the present time the JAFRC is principally devoted to aiding such anti-fascist refugees by supplying them with money, food, clothing, and medical assistance (R. 4, 15-25). A total of \$1,011,448.00 in cash and \$217,903.00 in kind was disbursed by the JAFRC from 1942 through 1947 for relief (R. 4). The funds for these relief activities were raised at social affairs, rallies, meetings, dinners, theatre parties, etc., conducted by the JAFRC, so that petitioner's ability

* By an order of the Court of Appeals for the District of Columbia dated and filed October 14, 1949, J. Howard McGrath, Attorney General of the United States, was substituted as a party appellee herein in the place and stead of appellee Tom C. Clark (R. 50).

to carry on its relief work is based upon the good will of the American people, which it has enjoyed (R. 4-5).

The petitioner's work has been and will continue to be seriously and irreparably damaged by actions of the respondents purportedly performed pursuant to Executive Order 9835 (R. 5). That Order was issued on March 25, 1947 and recited that it was based upon the President's constitutional powers and upon powers delegated by the Congress (R. 5). The stated purpose of Executive Order 9835 was to establish standards and machinery for determining the loyalty of federal civil service employees and applicants (R. 5). It provided for the establishment of the Civil Service Commission Loyalty Review Board which was to be furnished by the Department of Justice with, and was to disseminate to all departments and agencies, the name of each foreign or domestic organization, association, movement, group, or combination ~~of~~ persons which the Attorney General, after "appropriate investigation and determination," designates as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States or as seeking to alter the form of government of the United States by unconstitutional means" (R. 5-6). Membership in, affiliation with, "or sympathetic association with any" such designated "organization, association, movement, group or combination of persons" could, under the Order, "be considered in connection with the determination of disloyalty" (R. 5-6).

On November 24, 1947, in a letter to the respondent Seth W. Richardson, the then Attorney General Tom C. Clark listed the petitioner, among 90 organizations, as "subversive," although petitioner never received any notice or hearing concerning such designation (R. 6), and on December 4, 1947, the respondent Richardson released that letter to be publicized (R. 7).

The publication of that letter caused petitioner serious injury. As a direct result of the dissemination of the designation of the petitioner as "subversive": the Bureau of Internal Revenue announced that it had revoked its ruling classifying the JAFRC as a tax-exempt organization (R. 7, 26-27); contributors, especially present and prospective civil servants, reduced or discontinued their contributions to the petitioner (R. 7, 32); licenses required for the solicitation of funds were refused the JAFRC (R. 7); meeting places and facilities necessary for the conduct of the JAFRC fund-raising activities were denied to the petitioner (R. 7, 30-33); and the taint placed by the respondents upon the JAFRC lost the organization the support of speakers, entertainers, members and other participants (R. 8, 26). In response to a letter sent by Helen R. Bryan (R. 27), the JAFRC Executive Secretary, the various local chapters in Chicago (R. 27), Seattle (R. 27), San Francisco (R. 27-28), Philadelphia (R. 28) and Boston (R. 28-30) have indicated that the injurious effect of the Attorney General's appellation of the JAFRC as "subversive" has been nationwide.

The complaint further alleges that the acts of the respondents were without warrant in law and deprived petitioner of its rights in violation of the Constitution (R. 8); and that Section 9A of the Hatch Act and Executive Order 9835 are repugnant to the First, Fifth, Ninth and Tenth Amendments to the United States Constitution (R. 8-9).

Upon these allegations and upon the recitations of other appropriate jurisdictional requirements (R. 9), the first cause of action prays for a declaratory judgment (R. 9) and the second cause of action prays for injunctive relief (R. 9-10).

The prayer for relief is for: (1) a declaration that Executive Order 9835, and Section 9A as applied by Executive Order 9835, are unconstitutional; (2) an injunction:

(a) restraining the further dissemination by respondents of the name of petitioner as a designated organization;

(b) directing respondents to remove petitioner's name from the list of designated organizations and to make a public statement thereof;

(c) restraining respondents from taking any other action which may be based upon the inclusion of petitioner's name in the list of designated organizations; and

(3) a preliminary injunction for the same relief *pendente lite* requested in the preceding prayer for injunctive relief (R. 10-12).

Simultaneously with the service of the complaint, petitioner moved for a three-judge Court pursuant to 28 U. S. C. § 2282 and for a preliminary injunction (R. 2, 11). Respondents cross-moved to dismiss the complaint (R. 34). All the motions were argued before Judge LETTS who, after denying the application for a three-judge Court, proceeded directly to hear and consider the other motions. The motion to dismiss was granted and the injunction denied, without opinion, by order filed June 4, 1948 (R. 35). Thereafter an appeal to the United States Court of Appeals for the District of Columbia was duly instituted.

Opinion Below

The appeal in the Court of Appeals was argued on March 16, 1949, and on August 11, 1949, the ruling of the District Court was affirmed, EDGERTON, J., dissenting (R. 36-48). The majority opinion, written by PROCTOR, J., and concurred in by CLARK, J., found that "the complaint does not present a justiciable controversy" (R. 38) for the reason that, according to the majority of the Court, the

action of the Attorney-General in designating the JAFRC was performed as the *alter ego* of the President in a matter wherein the action of the President was not subject to judicial review (R. 38) and imposed "no obligation or restraint" upon the JAFRC (R. 38) but caused the JAFRC, "at most," only indirect and incidental injury (R. 39). The majority opinion proceeded further, "in view of the number of cases in this jurisdiction attacking validity of the loyalty program" (R. 40), to state briefly its views that Section 9A of the Hatch Act (R. 40), Executive Order 9835 (R. 40), and the action of respondents complained of are valid (R. 40); and that "nothing in the Hatch Act or the loyalty program deprives the Committee or its members of any property rights. Freedom of thought and belief is not impaired" (R. 41). The dissenting opinion found that the action of the respondents was unauthorized by Executive Order 9835 because of the failure to accord petitioner notice and hearing, and beyond the scope of Section 9A of the Hatch Act because, upon the conceded allegations of the complaint, the JAFRC is not an organization comprised within the terms of said Section 9A (R. 43); that as respondents found and publicly stigmatized petitioner as "subversive" without notice or hearing, respondents' action was invalid on constitutional grounds (R. 44); that the action complained of was invalid because it impaired and abridged First Amendment rights although, upon the record before the Court, no constitutionally sufficient reason therefor appeared (R. 45); that petitioner had standing to sue for injury to its reputation, impairment of First Amendment rights, and loss of contributions resulting from respondents' actions (R. 46); and that the equity jurisdiction of the Court allowed judicial review of and relief for the action of respondents here complained of (R. 47).

The majority and dissenting opinions in the Court of Appeals have been reported at 177 F. 2d 79.

Jurisdiction

The judgment of the Court of Appeals affirming the dismissal of the complaint and the denial of petitioner's motion for a preliminary injunction was made and filed August 11, 1949 (R. 49). A petition for rehearing addressed to the Court of Appeals was denied by order dated and filed September 22, 1949 (R. 52). On motion of the petitioner herein an order was made by Mr. Chief Justice VINSON on December 12, 1949 extending the time for the petitioner to petition for writ of certiorari to and including January 25, 1950.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

Statutes and Orders Involved

1. Section 9A of the Hatch Act (Act of August 2, 1939, c. 410, § 9A, 53 Stat. 1148, 5 U. S. C. A. § 118j):

“(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.”

2. The pertinent portions of Executive Order 9835 (12 Fed. Reg. 1935):

(a) Preamble.

"Now, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows":

(b) Part III, Section 3.

"The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies."

(c) Part V.

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Questions Presented

1. Whether Executive Order 9835, on its face and as applied herein by respondents, violates the Ninth and Tenth Amendments to the United States Constitution in that it asserts powers not delegated to the Federal Government but reserved to the people and the States by the United States Constitution.

2. Whether Executive Order 9835, on its face and as applied herein by respondents, abridges First Amendment rights of petitioner, its members and all others similarly situated in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

3. Whether Executive Order 9835, on its face and as applied herein by respondents, violates the Due Process Clause of the Fifth Amendment to the United States Constitution in authorizing the public designation of organizations as "subversive" by respondents without notice or hearing to those organizations, without any clearly defined standards to guide or delimit respondents in making such designation, without requiring any findings or conclusions to support such designation, and without according designated organizations any administrative or judicial review of that designation.

4. Whether the designation of petitioner as "subversive" together with the publication and circularization of that designation by respondents, concededly resulting in injury to the reputation of the organization and to its members, loss of contributions to and support of the organization, the denial of fund solicitation licenses to petitioner, the revocation of the organization's tax-exempt status by the Bureau of Internal Revenue, and the abridgment and impairment of the exercise of First Amendment rights by the organization, its members and all others similarly situated, presents a justiciable controversy.

5. Whether the stigmatizing designation of the JAFRC, deemed a conclusive determination in connection with the administration of Executive Order 9835 by respondents, presents a justiciable controversy.

6. Whether the stigmatizing and disseminated designation of the JAFRC by respondents is a reviewable exercise of executive power.

7. Whether the designation of the JAFRC by respondents as "subversive" and the public dissemination thereof by respondents to the injury of property and constitutional rights of petitioner and its members is a privileged official

communication with respect to which no cause of action for injunctive and other equitable relief is available.

8. Whether petitioner, an unincorporated association suing in its organizational name on behalf of all its members pursuant to Rule 17(b) (1) of the Federal Rules of Civil Procedure, has standing to assert that the action of respondents abridges property and constitutional rights of petitioner and its members in violation of the First, Fifth, Ninth and Tenth Amendments to the United States Constitution.

Specification of Errors

1. It was error for the Court of Appeals for the District of Columbia to affirm the order of the District Court granting the motion of respondents to dismiss the complaint.

2. It was error for the Court of Appeals for the District of Columbia to affirm the order of the District Court denying the motion of petitioner for a temporary injunction.

Summary of Argument

The sole, unlimited and unreviewable discretion accorded the Attorney General by Executive Order 9835 to adjudge and label organizations "subversive" without notice or hearing impairs and restrains the First Amendment rights of every individual in or contemplating federal employment; of every present or contemplated organization named, to be named, or capable of being named "subversive"; and of every person who has past, present, or contemplated membership, affiliation, or "sympathetic association" with an organization subject to designation at the pleasure of the Attorney General. This petition presents the question whether such unprecedented power

comports with the prohibitions contained in the First, Fifth, Ninth, and Tenth Amendments to the United States Constitution; that question warrants and requires consideration and adjudication by this Court in order that the right to form, to join, and to associate with organizations for the collective exercise of First Amendment activities may be definitively settled.

There is no delegation of executive power in the Constitution which authorizes Executive Order 9835. In sustaining the Executive Order which permits the Attorney General to dictate what is orthodox and proper in the area of thought, expression and association, the Court below contravened the injunction of *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642, that in no instance does the Constitution delegate such power to an official, "high or petty." Nor may Executive Order 9835 be sustained as executive action in aid of legislation for the Order is not expressly or impliedly authorized by any legislation and, indeed, is in conflict with Section 9A of the Hatch Act. And irrespective of the constitutional source which may be claimed for Executive Order 9835, the Order is invalid for on its face and as applied it punishes civil service employees for their thoughts, beliefs, expressions, and association; it subjects designated organizations and their membership to defamation, to economic loss, to loss of good will, to loss of essential privileges, to loss of membership and support; and it imposes a prior restraint upon all organizational First Amendment activities. As this cause comes before the Court upon a motion to dismiss, it is decisive that nowhere in the record herein does it appear or is it claimed that the restraints and abridgments by respondent of activities protected under the First Amendment are based upon a clear and present danger to the civil service or our national security. Moreover, the facts *dehors* the record confirm that there is no basis for the extraordinary and repressive measures here

complained of. The failure of Executive Order 9835 to require the Attorney General to grant a hearing, review, or other procedural safeguards to designated organizations further demonstrates that the Executive Order is in violation of the Fifth Amendment.

The instant cause properly raises and presents for adjudication the foregoing constitutional contentions. A justiciable controversy arose from the issuance by respondents of a defamatory blacklist which designated the petitioner-organization as "subversive." Moreover, as that list is a final and irrevocable administrative determination of the petitioner's status, for the purposes of the loyalty program, which induces present and prospective federal civil servants to sever their association with the JAFRC under threat of dismissal and proscription from federal employment, the ruling of the Court below that there is here no justiciable controversy is in conflict with the decision of this Court in *Columbia Broadcasting System v. United States*, 316 U. S. 407. And the validity of the action of respondents which thus creates a justiciable controversy is the subject of judicial review as it affects private property and constitutional rights and does not involve a political question; the circumstance that the action complained of includes that of a cabinet officer purporting to exercise primary executive power is immaterial for equity jurisdiction has frequently been extended to cabinet officers and executive power is no more immune from judicial review as to constitutionality than any other form of governmental action. Nor may respondents foreclose judicial inquiry into the constitutional propriety of their blacklist by characterizing it as a privileged official communication which will not found an action in libel; the complaint seeks declaratory and equitable relief, not money damages from respondents, and, therefore, the doctrine of privileged official communication here affords no basis for a dismissal. And, finally, the applicable decisions of this Court make

plain that petitioner, an unincorporated association, has standing to raise the First Amendment issues here presented particularly since, as a matter of substantive law, petitioner represents the aggregate of the, personal and property rights of its membership and sues in its organizational name only as a matter of procedural convenience pursuant to Rule 17(b)(1) of the Federal Rules of Civil Procedure.

Reasons Relied on for Allowance of Writ and Brief in Support of Petition

I

The petition herein presents "questions whose resolution will have immediate importance far beyond the particular facts and parties involved . . . tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country."*

In the last Term of the Court certiorari was granted in *Parker, et al., v. County of Los Angeles, et al.*, 337 U. S. 929, where petitioners challenged the validity of test oaths required under the so-called "Loyalty Check" program adopted by the Board of Supervisors of the County of Los Angeles. The writ was granted for the reason, as stated for the Court by Mr. Justice FRANKFURTER, that "serious questions seemed raised as to the scope of a state's power to safeguard its security with due regard for the safeguards of liberty assured by the Due Process Clause of the Fourteenth Amendment." *Parker, et al. v. County of Los Angeles, et al.*, 338 U. S. 327, 329. Constitutional questions similar to those which "seemed raised"

* VINSON, C. J., address to American Bar Association, September 7, 1949, reported at 70 Sup. Ct. XII, XIV.

in *Parker, et al., v. County of Los Angeles, et al.*, are here in fact raised; but as Executive Order 9835 is national rather than local in scope, and as its impact is greater upon persons and organizations because of the prestige and power of its sponsorship and enforcement, reasons for the granting of certiorari are here even more compelling than in *Parker, et al.; v. County of Los Angeles, et al.*

By its terms, Executive Order 9835 establishes machinery for inquiring into the "loyalty" of the two million federal civil service employees and of the millions of present and prospective applicants for federal employment. If Executive Order 9835 entailed no more, the challenge to the constitutionality of that Order by petitioner would render this an action affecting "tremendously important principles." But as this suit demonstrates, Executive Order 9835 has a vitality beyond the confines of the federal civil service.

On the facts and on the record herein the JAFRC is a lawful organization acting through lawful means to achieve lawful objectives—yet it has been publicly designated as "subversive" by the Attorney General of the United States. Executive Order 9835 empowers that official—who has the duty to prosecute organizations which seek to overthrow our form of government—to adjudge and stigmatize, without prosecuting, an organization as "subversive." The exercise of this power is delimited by no ascertainable standards, need not be preceded by any hearing or findings, and is non-reviewable. Under Executive Order 9835, the Attorney General, absent evidence which would satisfy a judge and a jury that an organization is illegal, uses the prestige and power of his office to label that same organization as "subversive." Plainly Executive Order 9835 establishes the Attorney General as the single and final arbiter of the orthodoxy of all organized political, social and religious activity.

This power, unlimited by regular standards or procedural safeguards, not only directly impairs the activities of every organization heretofore named by the Attorney General—it restrains every group of men, brought together for common activity on behalf of a common social, humanitarian or political objective, for they must hereafter beware of offending the political sensibilities of the Attorney General.* Statutes and orders, which concern the exercise of First Amendment rights, have a force generated by their very existence even apart from their enforcement. *Thornhill v. Alabama*, 310 U. S. 88, 98; *Winters v. New York*, 333 U. S. 507, 518; see 61 *Harvard Law Rev.* 1208-1215. Executive Order 9835 on its face, and independent of its administration, operates as a prior restraint upon every individual in or contemplating federal employment; upon every organization, named, to be named or capable of being named as “subversive” by the Attorney General; and upon past, present or contemplated membership, affiliation or “sympathetic association” with an organization subject to such designation—at the pleasure of the Attorney General. Executive Order 9835 thus imposes a present and continuing prior restraint on every aspect of the First Amendment rights of all the people. Accordingly, upon the determination of the constitutional issues here posited—issues not unique or indigenous to the petitioner-organization, but common to all organizations or associations formed for the collective exercise of First Amendment rights—is “based the plans, hopes, and aspirations of a great many people throughout the country.”

The decision of the Court of Appeals for the District of Columbia herein was reached by a bare majority and was

* The then Attorney General Tom C. Clark, when he issued his first list, assured the House Committee on Un-American Activities that the list of designated organizations was not complete and would be augmented. *N. Y. Times*, December 9, 1947, p. 23, col. 2. Subsequently another 32 groups were named by the Attorney General on May 28, 1948 at which time he informed Richardson “that additional lists would be added from time to time.” *N. Y. Times*, May 29, 1948, pp. 1, 6.

attended by the dissenting opinion of that judge of the Court of Appeals whose dissent in at least one prior instance came to be adopted as the view of this Court. See *Hurd v. Hodge*, 162 F. 2d 233, 235 (EDGERTON, J., dissenting), rev'd. 334 U. S. 24. And subsequent to the decision of the Court below herein, legislation enacted by the State of New York similar in its basic features to Executive Order 9835—albeit providing greater procedural rights and safeguards to the organizations affected—was held to be in violation of the State and Federal Constitution. *Thompson, et al. v. Wallin, et al.*, 122 New York Law J. 1513 (decided Nov. 28, 1949) (Sup. Ct., Albany Cty.); *Lederman, et al., v. Board of Education of the City of New York*, 122 New York Law J. ~~1667~~, ~~1668~~ (decided Dec. 14, 1949) (Sup. Ct., Kings Cty.). Commentators in the legal periodicals and elsewhere, as well as legislators (see citations set out *infra* at pp. 48-49), have expressed their doubts as to the constitutional propriety of Executive Order 9835. And as this Court has, to date, had no opportunity to pass upon the Order, there is lacking the final and definitive guidance which this Court alone can supply concerning the validity of Executive Order 9835 and related governmental action.

There are here posited unsettled issues which penetrate to the core and the limits of power and freedom in our system. Important First Amendment rights of all the people depend upon the disposition of those issues by this Court. And there is an urgency for decision by this Court; unlike legislation which affects only parties immediate to its enforcement, Executive Order 9835 operates, on its face, as a present, continuing, prior restraint of First Amendment rights. Under all the foregoing circumstances, although the power to grant certiorari herein rests, of course, in the sound discretion of this Court, the language of MARSHALL, C. J., in *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 404, here has compelling significance:

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them."

II

The grounds of decision assigned by the Court of Appeals for the District of Columbia are in conflict with the applicable decisions of this Court.

The variety of issues herein may be concisely paraphrased as follows:

(1) Can the Attorney General constitutionally be empowered, in the manner provided by Executive Order 9835, publicly to adjudge a legal organization to be "subversive" in the exercise of his sole and exclusive discretion? and, if not,

(2) Can an organization and its members thus designated obtain equitable relief?

The majority of the Court of Appeals for the District of Columbia answered the second question in the negative and then the first in the affirmative. In both instances the decision of the Court below was in conflict with the applicable decisions of this Court.

A

Executive Order 9835 Violates the Ninth and Tenth Amendments to the United States Constitution

It is fundamental that under the American constitutional system the Federal Government is one of enumerated powers. Authority exercised by any branch of the Federal Government must find its source either in express or implied powers granted by the United States Constitution, otherwise that authority does not exist. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *U. S. v. Butler*, 297 U. S. 1; *Kilbourn v. Thompson*, 103 U. S. 168; *Ex Parte Quirin*, 317 U. S. 1, 25-26. The foregoing principle applies and delimits the scope of governmental action even where an emergency situation obtains. *Ex parte Milligan*, 4 Wall. (U. S.) 2; *Schechter v. United States*, 295 U. S. 495, 528, 529. Consequently, all powers not expressly or impliedly granted to the Federal Government are reserved to the States or to the people thereof and prohibited to the Federal Government. *United States Constitution*, Amendment X. It is therefore decisive that no express or implied authorization appears in the Constitution for Executive Order 9835.

1. There is no power in any agency of Government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . [under] any circumstances."

The normal process of constitutional adjudication involves the balancing of governmental power and individual rights. But no such balancing is here required. Under the doctrine of *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, there is no power, for there is no duty, to perform the acts complained of by the JAFRC.

Executive Order 9835 authorizes the Attorney General to designate organizations “. . . as totalitarian, fascist, communist or subversive . . .” (Part III, Section 3). It is not required that the organization be thus designated on the basis of any specified acts nor are any other limitations imposed upon the Attorney General’s discretion. The Attorney General’s designation is to be premised upon his evaluation of whether the ideas or opinions, about which the organization is formed, are “totalitarian, fascist, communist or subversive.” The terms thus defining the organizations which may be named are so vague* that the Attorney General is virtually empowered to proscribe as “subversive” what he might find “at the moment was contrary to his . . . notions of what was good for health, morals, trade, commerce, justice or order” (*Musser v. Utah*, 333 U. S. 95, 97). In short, the Executive Order enables the Attorney General to define what is orthodox and proper in the area of thought, speech and association.

Such power is the subject neither of express nor implied delegation by the Constitution. It was not intended to surrender by the Constitution the “blessings of liberty” which, according to the preamble thereof, the Constitution was ordained and established “to secure.” Federalist Papers, No. 84 (Hamilton). Accordingly it is the doctrine of the *Barnette* case:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are any circumstances which permit an exception, they do not now occur to us*” (319 U. S., 642). (Italics supplied.)

* The term “subversive” was deemed vague and indefinite in *Winters v. New York*, 333 U. S. 507, 518, while in *Feinglass v. Reinecke*, 48 F. Supp. 438, a statutory test which would disallow on the ballot any “organization or group . . . associated, directly or indirectly, with Communist, Fascist, or other un-American principles” was said to be “so vague and indefinite as to make the Act invalid.”

This doctrine of the *Barnette* case was reiterated in the concurring opinion of Mr. Justice JACKSON in *Thomas v. Collins*, 323 U. S. 516:

"But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because *the forefathers did not trust any government to separate the true from the false for us*" (323 U. S., 545). (Italics supplied.)

And for considerations resembling closely those enunciated in *Barnette*, this Court declared that the requirement that beliefs or expressions "conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan v. Esquire*, 327 U. S. 146, 158.

The lack of power to prescribe norms of thought, opinion, or expression constitutes the power accorded the Attorney General under Executive Order 9835 a violation of the reservation of non-delegated powers.

2. Article II, Section 2 of the United States Constitution does not authorize Executive Order 9835.

It was suggested below that the Order may be predicated upon the power of the President to "... require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices . . ." (*United States Constitution*, Article II, § 2).*

The power of the President to obtain information from his cabinet officers is no basis for the publication of the list

* Hamilton wrote of this Section as "a mere redundancy in the plan, as the right for which it provides would result of itself from the office." *Federalist Papers*, No. 74.

by the Attorney General. The Executive Order does not require or direct the Attorney General to supply the President with any information nor was the list published as a communication to the President. It may be presumed that the Attorney General has access to the President through media other than the public press. Nor can it be successfully maintained that the determination of the political orthodoxy of organizations is a "subject relating to the duties" of the Attorney General. *Thomas v. Collins*, 323 U. S. 516, 545; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Executive Order 9835, patently dedicated to a purpose other than supplying the President with information, is not sustainable as an exercise of the powers delegated by Article II, Section 2. *United States v. Butler*, 297 U. S. 1; *Bailey v. Drexel Furniture Co.*, 259 U. S. 20.

3. Article II, Sections 1 and 3 of the United States Constitution do not authorize Executive Order 9835.

Respondents below referred to "primary," "inherent executive power," derived from the provision that "the executive power shall be vested in a President of the United States of America" (Article II, Section 1), as the constitutional authorization for Executive Order 9835; the Court below rested its conclusion on Article II, Section 3 wherein the President is enjoined to ". . . take care that the laws be faithfully executed . . ." Neither provision is a delegation of constitutional power authorizing Executive Order 9835.

Section 1 of Article II is no grant of power. Section 1 was included in order to assure sole rather than multiple executive leadership. *Federalist Papers*, No. 70.

Section 3 requires the Executive to "approve and execute" the laws of the land (*Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304, 329; cf. *Ex Parte Milligan*, 4 Wall.

(U. S.) 2, 121), it does not authorize powers beyond that delegated and required by the laws of the United States.

Of course, the Executive does possess certain auxiliary powers which are vast in areas, such as the conduct of foreign affairs or the administration of war activities, where those powers are in aid of express powers granted the President by the Constitution. See, e. g., *United States v. Curtiss-Wright Export Corporation*, 299 U. S. 304; *United States v. Belmont*, 301 U. S. 324; *Ex parte Endo*, 323 U. S. 283; *Korematsu v. United States*, 323 U. S. 214; *Myers v. United States*, 272 U. S. 52. But where the auxiliary power asserted by the Executive is not in connection with any express constitutional executive power, then the circumstance of the assertion of such auxiliary power must be limited and exceptional if ours is to remain a government of enumerated powers. See, e. g., *United States v. San Jacinto Tin Co.*, 125 U. S. 273; *In re Neagle*, 135 U. S. 1; *In re Debs*, 158 U. S. 564. Nor is it here necessary to define precisely the extent of the auxiliary powers of the Executive for, at the least, neither the Executive nor any other branch of government has the express or implied power to proscribe what is good or what is bad, moral or immoral, in the fields of politics, nationalism, religion, or other matters of opinion; there is no power and no duty in any agency of government to declare what is orthodox or unorthodox in such matters. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642; *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 158; *Thomas v. Collins*, 323 U. S. 516, 545.

The Court below treated Executive Order 9835 as an instrumentality for the enforcement of Section 9A of the Hatch Act and, therefore, as authorized by Section 3 of Article II of the Constitution (R. 41); and the Court also suggested that Executive Order 9835 was an exercise of the inherent executive removal power (R. 40). But Executive Order 9835 is not authorized by Section 9A of

the Hatch Act and, in fact, is inconsistent with that statute. Accordingly, Executive Order 9835 is not justifiable as an implementation of Section 9A. Nor may Executive Order 9835 subsist as an exercise of the inherent executive removal power since Executive Order 9835 extends to federal employees appointed, by department heads and others, under Congressional authority (see *United States Constitution*, Article II, § 2, cl. 2), and as to such employees, the executive power does not authorize the President to employ removal standards different from those established by the Congress. *Humphrey's Executor v. United States*, 295 U. S. 602; *United States v. Perkins*, 116 U. S. 483.

Thus, while Section 9A of the Hatch Act authorizes the removal of those employees who "... have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States," the Executive Order permits removal where "reasonable grounds exist for the belief that the person involved is disloyal" (Pt. V, § 1). The difference between the two standards is plain.* Note, 47 *Columbia Law Rev.* 1161, 1174. Indeed, prior to Executive Order 9835, while a conditional employee or an applicant could be disqualified by the Civil Service Commission where there was "reasonable doubt as to his loyalty to the Government of the United States" (7 Fed. Reg. 7723 (1942)), unconditionally appointed employees could not be discharged upon such grounds but only for membership in the organizations prescribed under Section 9A.

* In addition to the differences noted in the text, Section 9A proscribes membership in certain organizations, while the Order covers "membership ... affiliation ... or sympathetic association" (see *Bridges v. Wixon*, 326 U. S. 135, wherein differences in these terms are set out); moreover, Section 9A applies only to organizations which advocate "the overthrow of our constitutional form of government" and the Order includes organizations designated "as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

"The Interdepartmental Committee" regards an employee as subject to removal only if it is established that the employee was (1) a member of an organization advocating the overthrow of the Government by force or violence, or (2) personally so advocates the overthrow of the Government by force or violence."

"It is thus apparent that the Interdepartmental Committee is using a different and more technical standard than that employed by the Civil Service Commission . . . The Interdepartmental Committee points out that the standard it uses is the one required by existing legislation. It is not authorized to go beyond that standard." Subcommittee of House Civil Service Committee, Report of Investigation with Respect to Employee Loyalty, etc. (1946), p. 4; see also Report of President's Temporary Commission on Employee Loyalty (1947), pp. 7, 13.

The material variance between the standards of Executive Order 9835 and the Hatch Act is further emphasized by Section 9(a) of the latter:

"All [federal employees] shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates" (18 U. S. C. § 118i(a)).

The civil servant who may be discharged as disloyal for "sympathetic association" with any organization which the Attorney General deems to be "subversive" does not "retain the right . . . to express [his] opinions on all political subjects and candidates."

Furthermore, as Section 9A provides that "it shall be unlawful" for federal employees to have membership in defined organizations and prescribes a sanction therefor which may be characterized as punishment under *United States v. Lovett*, 328 U. S. 303, a serious question exists

** This Committee dealt with unconditionally appointed government employees while the Civil Service Commission reviewed the loyalty of applicants and conditional employees.

whether the constitutional right to trial by jury in all criminal cases is here applicable or whether, in any event, a charge of violation of Section 9A so partakes of the nature of a criminal charge as to require the applicability of Fifth and Sixth Amendment safeguards.* An affirmative answer to such question would preclude the conclusion that it was intended or contemplated that the machinery established by Executive Order 9835 be set up for the purpose of adjudging guilt and assessing punishment under Section 9A. For it cannot be concluded "in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guaranties of due process of law and trial by jury are not to be forgotten or disregarded." *Lipke v. Lederer*, 259 U. S. 557, 562.

Executive Order 9835 is therefore not authorized by Section 9A of the Hatch Act, but, rather, is in conflict with Section 9A. Instead of supplying Executive Order 9835 with a constitutional matrix deriving from the executive power to enforce the laws, Section 9A invalidates Executive Order 9835. As Section 9A conflicts with rather than authorizes Executive Order 9835, there is absent any power delegated to the Executive by the Constitution upon which the Executive Order can be predicated. The absence of such a delegation of powers renders Executive Order 9835 invalid under the Ninth and Tenth Amendments.

* It is noteworthy that when first enacted Section 9A was incorporated as part of the Criminal Code at Section 61i of Title 18 of the United States Code.

B

**Executive Order 9835 Violates the Fifth Amendment to the
United States Constitution in That It Abridges Rights
Guaranteed Under the First Amendment**

It is elementary that federal executive action is limited by the Due Process Clause of the Fifth Amendment. As the scope of the protection of the Fifth Amendment is as broad as that of the Fourteenth Amendment (*Farrington v. Tokushige*, 273 U. S. 284, 298), the Due Process Clause of the Fifth Amendment comprises the guarantees of the First Amendment in the same manner as does the Due Process Clause of the Fourteenth Amendment. *United States v. Korner*, 56 F. Supp. 242. Executive action, as any other governmental action, is therefore subject to the restraints of the First Amendment. *Ex parte Endo*, 323 U. S. 283, 299, 300; see also *United Public Workers v. Mitchell*, 330 U. S. 75, 94, 95. And irrespective of whether Executive Order 9835 is the exercise of a power delegated to the Executive by the Constitution or by Congressional enactment, in the exercise of that power the Order violates the prohibitions contained in the Bill of Rights against governmental action which abridges speech, press or assembly.

1. The respondents' actions restrained and abridged rights under the First Amendment.

Executive Order 9835 authorizes the Attorney General, without definable or delimiting standards, to label organizations "subversive." The prior restraints inherent in the power thus granted are augmented by the circumstance that the Attorney General is authorized to act without hearings at which the charged organization may hear and refute evidence against it or present evidence on its own

behalf; without findings to indicate whether his action is based upon competent or reliable evidence; and without affording the organization designated or the civil service employee or applicant charged with "association" with the organization any opportunity otherwise to test the sufficiency of the determination made by the Attorney General.

The activities subject to the foregoing unprecedented power are First Amendment activities.

Thus the conceded allegations of the complaint recite that the JAFRC was organized, maintained, and functions to provide relief for anti-fascist refugees, particularly those refugees from Spain. Its organization and activities have been motivated by certain humanitarian and social ideals.* Those ideals constitute matters of public interest and in the realization of those ideals the constitutionally guaranteed rights of speech, press and assembly are employed.

To the extent that the respondents' actions have resulted in the inability of the petitioner to procure the facilities necessary to conduct its activities, petitioner's freedom of speech, press and assembly have been impaired by respondents. As in *Bowe v. Secretary of Commonwealth*, 69 N. E. 2d 115, 130, 131 (Mass.)—

"Deprived of the right to pay any sum of money for the rental of a hall in which to hold a public rally or debate, or for printing or circulating pamphlets, or for advertising in newspapers, or for buying radio time, a union[']s . . . rights of freedom of the press and of peaceable assembly would be crippled."

* Prior to the publication of the Attorney General's list, the *N. Y. Times* stated editorially: "We must hope that the new order will not be used to penalize liberals who believe in democratic Spain . . ." (March 24, 1947, p. 24, col. 2); subsequent thereto it declared ". . . we knew that communists and non-communists may personally agree up to a certain point—for instance, in their concern for refugees who dare not return to Franco Spain" (December 6, 1947, p. 14, col. 2). Cf. Hearings on H. R. 3588, 80th Cong., 1st Sess. (1947), p. 34; *Bridges v. Wixon*, 326 U. S. 135, 143.

The views and objectives of the JAFRC are such that its use of speech, press and assembly to express those views and to accomplish those objectives is constitutionally guaranteed by the First Amendment so that the abridgements of petitioner's speech, press and assembly occasioned by respondents must be considered in the light of the First Amendment. *Thomas v. Collins*, 323 U. S. 516, 437.

The abridgement of freedom of association by respondents is even more patent. Persons are unwilling to join, support, contribute to, or otherwise participate in the activities of an organization officially labelled "subversive." Civil servants, present and prospective, may be fired or refused employment as "disloyal" for any association with the JAFRC; others "associated" with the JAFRC expose themselves to economic, social and political sanctions (see *e. g.* Bryan affidavit, R. 28-30) and may be fearful of the possibility of more serious future consequences.

The freedom of association thus impaired by respondents is the freedom of persons to gather together upon the basis of some common social or humanitarian ideal. We are "a nation of joiners." Cushman, "The President's Loyalty Purge," 36 *Survey Graphic* 283, 287. Association for the exchange of common views and objectives, and for the public presentation and support thereof has long been a vital aspect of American life. DeTocqueville, *Democracy in America* (1840), Part II, Bk. 2, c. 5; 2 Bryce, *American Commonwealth* (1924), p. 282; Wyzanski, "The Open Door and the Open Window," 36 *California Law Rev.* 336, 346. "Individuals seldom impress their views upon the electorate without organization. They have a right to organize . . . even into what are called 'pressure groups' for the purpose of advancing causes in which they believe." *Bowe v. Secretary of Commonwealth*, *supra*, at 130. One political scientist has observed:

"Freedom of association, in short, raises issues which go to the root of the modern state. Without it no other freedom can have very much content." Laski, "Freedom of Association," 6 *Encyclopedia of Social Sciences* 447, 450 (2 ed. 1940); see also Mill, *Essay on Liberty* (1864), pp. 28, 197.

And more recently it was noted that

"... one of the most precious of all rights, one essential to the effective operation of democracy—[is] the right of association. The practice of voluntary association is a peculiarly English and American practice. The Pilgrim Fathers associated themselves into a compact—incidentally it was a subversive one from the point of view of the English Government—and since that time Americans have customarily operated through thousands of voluntary associations: political parties, parent-teachers, veterans, business, fraternal, philanthropic, recreational, learned, and others. It is in these associations that the average American has found more training for self-government and real democracy than the famed town meeting. A policy that discourages or crushes voluntary associations will dry up the very roots of American democracy." Commager, "The Real Danger—Fear of Ideas," *New York Times Magazine*, June 26, 1949, p. 47.

The foregoing fundamental right of freedom of association is constitutionally guaranteed as are the cognate freedoms of speech, press and assembly. *Fiske v. Kansas*, 274 U. S. 380; *Herndon v. Lowry*, 301 U. S. 42; *Thomas v. Collins*, 323 U. S. 516; *DeJonge v. Oregon*, 299 U. S. 353, 365; *United States v. Hauck*, 155 F. 2d 141, 144; *United States v. Korner*, 56 F. Supp. 242, 249; cf. *United States v. Cruikshank*, 92 U. S. 542; see *Whitney v. California*, 274 U. S. 357, 371, 372. The abridgement of petitioner's freedom of association, and the restraint of the freedom of association of all other organizations, invokes the prohibitions contained in the First Amendment.

The applicability of the First Amendment is not affected by the circumstance that the Order does not in terms provide for "direct and candid efforts to stop speaking or publication as such." *Thomas v. Collins*, 323 U. S. 516, 547. Even if the impairment were an incident rather than the objective of the Order, this Court must nevertheless afford full deference to the prohibitions contained in the First Amendment. *Grosjean v. American Press Co.*, 297 U. S. 233; *Murdock v. Pennsylvania*, 319 U. S. 105. In any event, the abridgements and restraints of associational freedom by respondents were intended and not merely consequential since the purpose of the publication of the list was to deter present and prospective civil servants, as well as all the people, from "associating" in any manner or fashion with designated organizations (see pp. 59, 63, *infra*). Nor can respondents argue, in fact or in law (*Thomas v. Collins*, 323 U. S. 516, 543), that the impairments occasioned by the Order are trivial or insubstantial. This Court is squarely confronted with the question whether the Order is compatible with the provisions of the First Amendment.

2. **There is no constitutionally sufficient justification for respondents' abridgement of petitioner's rights under the First Amendment.**

The constitutional prohibition of abridgement of speech, press or association extends to a grant of power to an official authorizing him to impair free expression or association. *Hannegan v. Esquire*, 327 U. S. 146, 151, 158; *Ex parte Endo*, 323 U. S. 283, 298; *Thornhill v. Alabama*, 310 U. S. 88, 97; *Lovell v. Griffin*, 303 U. S. 444; *Near v. Minnesota*, 283 U. S. 697; Chafee, *Free Speech in the United States* (2 ed. 1941), pp. 29, 309, 310. Under the decisions of this Court the infringement upon First Amendment rights may be sustained only under the most limited circumstances: the exercise of the constitutional rights abridged must

create a clear and present danger of overt action inimical to a paramount public interest.* *Schenck v. United States*, 249 U. S. 47; *Bridges v. California*, 314 U. S. 252; *West Virginia State Board of Education*, 319 U. S. 624; *Thomas v. Collins*, 323 U. S. 516; *Terminiello v. City of Chicago*, 337 U. S. 1. The presence of such a clear and present danger may not be presumed. *Thomas v. Collins*, 323 U. S. 516, 529; *Thornhill v. Alabama*, 310 U. S. 88, 96; *United States v. Carolene Products Co.*, 304 U. S. 144, 152 n. 4. This Court must independently "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" *Schneider v. Irvington*, 308 U. S. 147, 161. Moreover, the burden of proving that a constitutionally sufficient purpose exists to justify the abridgement is upon defendants. *Busey v. District of Columbia*, 75 App. D. C. 352, 138 F. 2d 592.

The foregoing stringent and well-settled prerequisites imposed upon governmental action which would seek exception from the absolute prohibitions contained in the First Amendment are not here dissipated or mitigated because Executive Order 9835 ostensibly is concerned with civil service employees. For while this Court utilized the "reasonableness" rather than the "clear and present danger" test in *United Public Workers v. Mitchell*, 330 U. S. 75, for the determination of the constitutionality of the prohibition contained in Section 9(a) of the Hatch Act (Act of August 2, 1939, c. 410, §9(a), 53 Stat. 1148 (1939), 5 U. S. C. A. §118i) against political activities of civil service employees, the restraints and abridgements occasioned by Executive Order 9835 extend beyond political activities of civil service employees to affect the freedom of thought, expression and association of every organization labelled or capable of being labelled as "subversive" by the At-

* The clear and present danger test applies to impairments of freedom of association. *Shaw v. State*, 76 Okl. Cr. 271, 134 P. 999; Note, 61 *Harvard Law Rev.* 1215, 1217.

torney General and to every person associated with such an organization. The rule of the *Mitchell* case was expressly and closely confined to political *activity*; thought, expression and association were to remain entitled to the established and traditional safeguards of the First Amendment (see, *e.g.*, 330 U. S., at 99, 100). Moreover, whatever rule may obtain under the *Mitchell* case, that rule did not overrule the clear and present danger test in other circumstances* nor does it apply here where First Amendment rights of organizations and persons other than civil service employees are involved.

Upon respondents' motion to dismiss the complaint, respondents have in no wise indicated that there is any present or imminent danger to the civil service, or that petitioner—or any other designated organization—creates a clear and present danger to the Government or any other paramount public interest. Nor have respondents filed any affidavits or other papers in opposition to the petitioner's motion for a preliminary injunction. As all of the allegations of the complaint must be conceded as true upon the respondents' motion to dismiss, which is here on appeal, and as, indeed, petitioner is entitled to the benefit of every favorable inference which may reasonably be drawn from the complaint (*Ickes v. Fox*, 300 U. S. 82, 96), it is plain that upon the record before this Court, the respondents have failed to demonstrate the clear and present danger which alone could, under the decisions of this Court, justify respondents' abridgement of the First Amendment rights of the petitioner.

"We think we may now hold that when legislation appears on its face to affect the use of speech, press or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their

* The clear and present danger test was employed by this Court subsequent to the *Mitchell* case in *Terminiello v. City of Chicago*, 337 U. S. 1; cf. *Giboney v. Empire Ice, etc.*, 336 U. S. 490, 503.

existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded." *Busey v. District of Columbia, supra*, 138 F. 2d, at p. 595.

Moreover, the facts demonstrate that the Executive Order does not arise out of any present, existent danger to the Government and, indeed, that there is not even a reasonable basis for the wholesale screening of civil servants and, particularly, that there is no reasonable basis for according the Attorney General the power here complained of.

The Executive Order is an unprecedented grant of power.* It is a promulgation national in application which renders the Attorney General the single and final arbiter of the orthodoxy of all organized activity. Consideration of American constitutional experience indicates that only the most pressing national exigency could justify the Order.

At the conclusion of the Revolutionary War this country was young, weak and in jeopardy from internal and foreign enemies.

"The betrayal of Washington by Arnold was fresh in mind. They were far more awake to powerful enemies with designs on this continent than some of the intervening generations have been. England was entrenched in Canada to the north and Spain had repossessed Florida to the south, and each had been the scene of invasion of the Colonies; the King of France has but lately been dispossessed in the Ohio Valley, Spain claimed the Mississippi Valley; and except for the seaboard, the settlements were sur-

* John Lord O'Brien referred to "... such unprecedented features [in the Executive Order] as the power conferred upon the Attorney General to designate *ex parte* organizations as subversive." O'Brien, "Loyalty Tests and Guilt by Association," 61 *Harvard Law Rev.* 592, 605.

round by Indians—not negligible as enemies themselves, and especially threatening when allied to European foes. The proposed national government could not for some years become firmly seated in the tradition or in the habits of the people . . .

“The forefathers also had suffered from disloyalty. Success of the Revolution had been threatened by the adherence of a considerable part of the population to the King.” *Cramer v. United States*, 325 U. S. 1, 8-9.

And yet, under these conditions, the crime of treason was narrowly defined in the Constitution and the proof required explicitly defined (Article III, § 3) while bills of attainder were prohibited (Article I, §§ 9, 10).

Early in our history, supporters of the French Revolution were considered radicals and traitors by the Federalists and the Federalist Party enacted the Alien and Sedition Acts calculated to apply the doctrine of constructive treason to those supporters. But despite the fact that the Republicans were accused of being under the influence and in the employ of a foreign power at a time when the new Government was vulnerable to subversion, the passage of those Acts resulted in the downfall of the Federalist Party; the repeal of the Acts; and the pardoning of all those imprisoned under those Acts. Chafee, *Free Speech in the United States* (2 ed. 1941), pp. 27-28.

The Civil War engendered deep internal conflict within the nation. But not only did the Supreme Court strike down loyalty oath tests required for the practice of certain professions and practices (*Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Ex Parte Garland*, 4 Wall. (U. S.) 333), but the Fourteenth Amendment was carefully framed to exclude from government service only those who had engaged in acts of “insurrection or rebellion” or otherwise committed treason (Amendment XIV, § 3).

Our country has been strengthened not subverted because it has chosen freedom over suppression and restraint.* If that choice brought strength when this nation was young, we should not now, as the most powerful country in the world, sacrifice the source of our moral strength and our tradition of freedom on some speculative danger. The abridgements occasioned by the Executive Order may not be justified by vague or nebulous references to subversion or revolution. It is therefore decisive that the facts available show no real danger sufficient to warrant those abridgements.

Thus the Executive Order does not recite that it is based upon any great or present threat; instead the preamble reads:

"Whereas, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the government service of any disloyal or subversive person constitutes a threat to our democratic processes."
(Italics added.)

And the report of the President's Temporary Commission on Employee Loyalty, upon which the Order was based, found not any immediate or substantial threat but the following:

"While the Commission believes that the employment of disloyal or subversive persons presents more than a speculative threat to our present system of government, it is unable, based on the facts presented to it, to state with any degree of certainty how far reaching that threat is . . . The Commission is convinced that the combination of these two means (counter-espionage and a loyalty program) provides

* "Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 636, 637 (JACKSON, J.).

our best protection from a danger *which can develop into a real threat* to our national security." Report of President's Temporary Commission on Employee Loyalty (1947), pp. 21, 23. (*Italics added.*)

The history of the American civil service could support no finding other than that it has been loyal, devoted and constituted no present or substantial danger.

Prior to the enactment of the Hatch Act in 1939, political beliefs and affiliations of civil servants were no concern of the Federal Government (*Priddie v. Thompson*, 82 F. 186) and, indeed, it was specifically provided that no inquiry should be made "concerning the political or religious opinions or affiliations of any applicant" and "all disclosures thereof shall be discountenanced" (Civil Service Rule I, 5 Code Fed. Regulations (1939) §§ 1-2). Our national experience of 150 years prior to 1939 indicates that according civil servants the political freedom enjoyed by other citizens created no threat to the Government. On the contrary, that freedom encouraged the growth of an efficient and loyal civil service.

Developments after the passage of the Hatch Act did not disclose any changes in that loyalty such as would necessitate the present loyalty program. For the loyalty program grew not out of any threats to our security but out of the rival efforts of the Congress and the President to exploit politically the public anti-communist hysteria. See Emerson and Helfeld, "Loyalty Among Government Employees," 58 *Yale L. J.*, 1, 8-26.

Section 9A of the Hatch Act was supplemented by various other measures. Appropriations, beginning July 1, 1941 (55 Stat. 289 (1941)), were made authorizing the Federal Bureau of Investigation to investigate civil servants. In riders to appropriation bills, Congress forbid payment of salaries to advocates of or members of organizations advocating "the overthrow of the Government of the United States" (see, e. g., 55 Stat. 123 (1941)); and

then forbid payment to specified executive officials (57 Stat. 450 (1943)) until it was held that this device was not available to the Congress (*United States v. Lovett*, 328 U. S. 303). The Civil Service Commission investigated civil service applicants and denied employment to an application where there was "a reasonable doubt as to his loyalty" (7 Fed. Reg. 7723 (1942) § 18.2 (c)(7)); while first an Interdepartmental Committee established by the Attorney General (*N. Y. Times*, April 23, 1942, p. 15, col. 3) and then an Interdepartmental Committee on Employee Investigations established by Executive Order 9300, assisted the various agencies in investigating the loyalty of those already in the civil service.

On January 8, 1945 a subcommittee of the House Civil Service Commission was authorized to survey the federal civil service loyalty policies and practices. H. Res. 66, 79th Cong., 1st Sess. (1945). Its report of July 1946 led to the creation, by Executive Order 9806, of the President's Temporary Commission on Employee Loyalty, in November 1946, which was to inquire further into federal employee loyalty standards and machinery, and to report thereon by February 1, 1947. 11 Fed. Reg. 13863 (1946). The Commission's report was submitted to the President on February 20, 1947 but was not then released. *N. Y. Times*, March 23, 1947, p. 1, col. 8. On February 26, 1947, however, the House Committee on Un-American Activities proposed the establishment of a Federal Loyalty Commission with final powers to pass upon employee loyalty. *N. Y. Times*, February 27, 1947, p. 14, col. 2. This announcement to the press proved a potent stimulant in the pre-election year of 1947 and shortly thereafter it became known that President Truman was preparing recommendations to keep "disloyal" persons out of the Government. *N. Y. Times*, March 6, 1947, p. 3, col. 7. On March 22, 1947, the President released simultaneously the report of the Commission and Executive Order 9835 which incorporated most of the Commission's recommendations.

It has been suggested that the Executive Order "... was received with outward applause and inward chagrin by the Republicans in Congress, many of whom felt the President had adroitly deprived them of a campaign weapon for 1948." *N. Y. Times*, May 1, 1947, p. 1, col. 7; cf. Schlesinger, "What Is Loyalty?", *N. Y. Times*, November 2, 1947, Magazine Section pp. 7, 49; American Civil Liberties Union, *Our Uncertain Liberties* (1948); p. 23. In this connection it is significant that in 1947, after the Executive Order was promulgated but before an appropriation was made for it, the Rees Bill was introduced. H. R. 3813, 80th Cong., 1st Sess. That bill was substantially identical, except for certain administrative differences, with the Executive Order. Hearings were held on this bill in the month of June before the House Committee on Post Office and Civil Service. On June 19, 1947 the Committee brought the bill on to the floor of Congress, together with a report thereon (H. Report 616, 80th Cong., 1st Sess. (1947)), and after extensive debate (93 Cong. Rec. 7066, 7497, 9118-9156), the bill was passed by the House. The bill was subsequently, however, killed in the Senate Civil Service Committee. *N. Y. Times*, July 24, 1947, p. 9, col. 2.

In addition to indicating the political rather than security considerations which motivated the promulgation of Executive Order 9835, the foregoing brief history provides the basis for evaluating the need for the Order. For in view of this plethora of inquiries into the loyalty of federal employees after 1939 it may be assumed that if any menace or threat of subversion of the Government by those civil servants or the designated organizations existed, evidence thereof would have been elicited. The facts will show that no such threat exists.

The first full-scale investigation reported was that by the Interdepartmental Committee set up in 1942 by Attorney General Biddle to check a list of 4112 alleged "subversives" in the Federal Government (*N. Y. Times*, April

23, 1942, p. 15, col. 2), including 1121 names culled from the civil service by Representative Dies (*N. Y. Times*, November 20, 1941, p. 1, col. 3). After five months of intensive inquiry, the Attorney General sent the report of the Federal Bureau of Investigation to the House of Representatives. H. R. Document 833, 77th Cong., 2d Sess. (1942). A total of two persons on the list submitted by Dies were dismissed (*id.*, at 15-16), and of the other 2991 employees investigated, 34 were dismissed (*id.*, at 16-18). The Interdepartmental Committee concluded "Upon review of experience with the project to date, however, we conclude that it should not be continued as a broad personnel inquiry. Results achieved have been utterly disproportionate to resources expended. Sweeping charges of disloyalty in the Federal service have not been substantiated. The futility and harmful character of a broad personnel inquiry have been too amply demonstrated" (*id.*, at 26). Moreover, it was pointed out by the Attorney General that "It is inevitable that such sweeping investigations should take on an appearance of inquisitorial action alien to our traditions. They create disturbance and unrest, hurt esprit de corps, and produce a feeling of unease and insecurity" (*id.*, at 4).

The Report in 1946 of the Subcommittee of the House Civil Service Committee* was based upon hearings, which have not been printed, and attempted only "a brief historical statement of the problem and [to] pose certain questions for further study and investigation" (p. 1) for "the subcommittee did not have sufficient time to give the problem as careful study as ought to have been done" (p. 8).

The Report of the President's Temporary Commission on Employee Loyalty of 1947, based on hearings, exhibits and memoranda,** is the principal evidentiary basis upon

* Report of Investigation with Respect to Employee Loyalty and Employment Policies and Practices in the Government of the United States, 79 Cong., 2d Sess. (July 20, 1946).

** The memoranda referred to as exhibits and other exhibits in this Report were not at the New York Public Library which receives all printed matter distributed by the United States Government.

which Executive Order 9835 is premised. Cf. H. Report 616, 80th Cong. 1st Sess. (1947), p. 2. The Commission addressed letters to the Federal Bureau of Investigation, Naval Intelligence and Military Intelligence to ascertain "the extent to which the subversive or disloyal employee constitutes a problem in, or threat to, the federal service" (*id.*, at 10-11). Aside from the general conclusions drawn from the replies received from these agencies (*id.*, at 12), the facts recorded in the Report may be summarized as follows:

(1) From 1942 to 1946 there were reported to the Federal Bureau of Investigation 6193 cases of civil servants for investigation under the Hatch Act and the appropriation acts. Of this number 101 persons were dismissed as a result of the information developed (*id.*, at 16) (see also Hearings before House Committee on Un-American Activities on H. R. 1864 and H. R. 2122, 80th Cong., 1st Sess., Pt. 2 (1947), p. 41).

(2) From 1941 through December 31, 1946 the Civil Service Commission, which had jurisdiction over applicants and employees appointed conditionally, investigated 392,889 persons. Placements in the Federal Government for that same period totalled 9,604,935 (*id.*, at 18) indicating that only a very small percentage of applicants required any investigation. Of those investigated, 1307 were disqualified for the period from 1941 through 1946 on the grounds of "disloyalty" (*id.*, at 17). This figure is partially explained by the fact that "a major contributing factor to the high percentage of ineligible for the years 1941, 1942 and 1943 was the vigorous standards imposed, *e. g.*, exclusion of foreign born persons from civilian employment at Pearl Harbor" (*id.*, at 19). Of the total number of ineligible, 694 were considered by the Civil Service Commission to be ineligible as "Communists or fellow travellers" (*id.*, at 17).

(3) The Interdepartmental Committee, set up in 1943 by Executive Order 9300, had referred to it 729 cases

from February 5, 1944 to December 2, 1946 and of those cases 24 employees were dismissed (*id.*, at 20).

The subsequent hearings before the House Committee on Post Office and Civil Service from June 3 to June 10, 1947, revealed no new information, and nothing further appeared in House Report 616 on H. R. 3813, by the House Committee on Post Office and Civil Service, or in the debates on the Rees Bill.

Coincidentally with the request by the President for a substantial appropriation in connection with the enforcement of Executive Order 9835, the Civil Service Commission, at a hearing before the House Civil Service Committee, in June 1947, volunteered to supply the Committee with information from the various departments and agencies as to the number of employees discharged on loyalty grounds from July 1, 1946 to March 31, 1947. Hearings on H. R. 3588, 80th Cong., 1st Sess. (1947), p. 55. Consequently, just before the Congress considered the proposed appropriation for the enforcement of Executive Order 9835, newspaper accounts were carried of a report by the Civil Service Commission to the effect that 811 civil service employees had been discharged by various of the agencies for loyalty reasons from July 1, 1946 to March 31, 1947. *N. Y. Times*, July 18, 1947, p. 1, col. 2. Analysis of those accounts reveals that 38 of the 44 agencies reporting to the Commission reported that no employee was fired and no applicant was rejected for alleged disloyalty. Moreover, the figure of 811 was tentative only. While the Navy Department reported the dismissal of 23 civilian employees and the War Department reported the dismissal of 190 civilian employees and the rejection of 10 applicants, the total figure was arrived at by estimating that the War Department had actually disqualified about four times as many as reported. *N. Y. Times*, July 18, 1947, p. 18, col. 3. Subsequent reports from the remaining 10 executive agencies increased that estimate to 831; eight of the ten agencies

reported no dismissals for disloyalty, but the State Department stated that it had removed 20 employees, "mainly for communism," from June 1946 to August, 1947.* *N. Y. Times*, August 15, 1947, p. 8, col. 5.

The Federal Bureau of Investigation has reported, with regard to its investigation under the Executive Order, that by September, 1948, 2,110,521 federal employees had been processed and cleared by the Federal Bureau of Investigation; of the 6344 held for further investigation 5421 had been investigated leading to 1092 agency loyalty hearings wherein 821 employees were found fully loyal, 212 resigned, and only 59 were dismissed; of these 59, two were cleared by the Loyalty Review Board. *N. Y. Times*, September 23, 1948, p. 1.** President Truman stated that the Federal Bureau of Investigation reports show "the loyalty of 99.7% of all federal workers to be not even questionable." (*N. Y. Times*, October 12, 1948, p. 30); and Tom C. Clark, while Attorney General, announced of the investigation of federal employees that "less than one-fourth of 1 percent even had to be questioned as to their loyalty." (*N. Y. Times*, October 20, 1948, p. 10).***

* By August, 1947, 8 of these 20 employees had been permitted to resign without prejudice to other Government employment. Thereafter, 10 more were thus permitted to resign. *N. Y. Times*, October 4, 1947, p. 7, col. 5; November 14, 1947, p. 17, col. 4; November 18, 1947, p. 1, col. 6. See also, Andrews, *Washington Witch-Hunt*, pp. 3-103.

** Harry B. Mitchell, President of the United States Civil Service Commission recently submitted an affidavit in the pending suit of *Washington, et al. v. Clark, et al.* (Court of Appeals, District of Columbia, No. 10413), wherein he stated:

"As of March 31, 1949, of the cases reported to loyalty boards, 3,990 had been adjudicated. Of this number, 3,753 have been determined as eligible and only 237 have been determined to be ineligible. Of this 237, only 76 employees have been dismissed; 44 have been restored after appeal; and 117 were in process of appeal or pending removal" (J. A. 47, 48).

According to a more recent report, the number of persons removed under the Order comes to 123. *N. Y. Herald-Tribune*, Nov. 28, 1949, p. 26, col. 1.

*** More recently this figure has been revised to 99.97%. *N. Y. Herald-Tribune*, Nov. 28, 1949, p. 26, col. 3.

From the foregoing certain conclusions may be drawn:

(1) The total number of government workers or applicants dismissed for loyalty reasons, even under the loose, vague standards employed, is relatively small.

(2) Most of the dismissals and rejections occurred in the "sensitive agencies", i. e., the War, Navy and State Departments. The experience of those agencies provides no sound basis for action in other governmental agencies.

(3) After many years of diligent and zealous investigation, the various Executive, Congressional and loyalty program reports, hearings and debates contain few, if any, demonstrated instances of the commission or attempt of any overt act by a federal civil servant which act could be construed as intentionally dangerous or threatening to the welfare of the United States Government. There does not appear to be a single instance where an American civil servant was convicted and punished for treason, sedition,* correspondence with a foreign government, sabotage, or under any of the other laws which protect our national security.** As the Secretary of Commerce, Charles Sawyer, reported recently:

"* * * up to this time there has not been so much as an inference that, even during the war or later, any federal employee furnished any information to our enemies, nor what any fair-minded person would regard as proof that anything of importance was given illegally to our ally, Russia." *N. Y. Post*, September 5, 1948, p. 27.

* See Note, 48 *Columbia Law Rev.* 253, 261 n. 77.

** Lt. N. G. Redin, charged with turning over secret documents to a foreign power, was acquitted. *N. Y. Times*, July 18, 1946, p. 1, col. 6. Six State Department employees were charged with mishandling certain documents: three were never indicted; two were fined; one was nolle prossed; and none were found to have acted with criminal intent. *N. Y. Times*, October 25, 1946, p. 10, col. 4. The conviction of Judith Coplon for espionage is presently on appeal; and it has been announced that the conviction of Alger Hiss will be appealed.

In short, each determination of "disloyalty" made was based exclusively upon membership, affiliation, or "sympathetic association" with organizations proscribed by the agency passing judgment. See *N. Y. Herald-Tribune*, Nov. 28, 1949, p. 26, col. 1-3. But since guilt by association is insufficient as a method of proof (*Herndon v. Lowry*, 301 U. S. 242, 260; *Schneiderman v. United States*, 320 U. S. 118, 154; *Bridges v. Wixon*, 326 U. S. 135, 147; *Kotieakos v. United States*, 328 U. S. 750, 772), it is literally correct that "There is no evidence to justify the wholesale screening now undertaken by the Federal Government." American Civil Liberties Union, *Report of Committee on Employees' Loyalty*, January 28, 1948, p. 1. Thus, after the most intensive inquiry into the genesis of the Executive Order heretofore made, it has been concluded:

"The first question is whether a general loyalty program, embracing all Federal employees, is necessary or desirable. The authors are of the opinion that no sufficient case for such a program has been demonstrated. No concrete showing of immediate and widespread danger adequate to outweigh the price that must be paid in the loss of democratic values, has thus far been presented to the country." Emerson and Helfeld, *op. cit. supra*, p. 135.

The stated justification for the vast loyalty program is not serious or extensive disloyalty in the ranks of the civil service, but the presence of *any* disloyal person in government service (see p. 36, *supra*); and the facts as analyzed reveal that no other justifications could be suggested for exposing 2,000,000 persons to an inquiry into their private thoughts, beliefs and associations and to dismissal for disloyalty based upon hearsay, rumor, gossip and reports from "confidential" sources. This Court is confronted with evaluating whether that justification is constitutionally sufficient. On the one hand, the loyalty program not only authorizes an inquiry into matters of opinion and association but permits a federal employee to be

dismissed as disloyal, and thereby punished (*United States v. Lovett*, 328 U. S. 303), for his thoughts and beliefs although it has never heretofore been supposed that mere opinions and beliefs—under any circumstances—could be the basis for punishment. *Cantwell v. Connecticut*, 310 U. S. 296, 303; *United States v. Ballard*, 322 U. S. 78, 86; *Mutual Film Corp. v. Industrial Comm.*, 236 U. S. 230, 243; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642; Mill, *On Liberty* (1864), pp. 23, 27, 28; cf. *Thomas v. Collins*, 323 U. S. 516, 531. On the other hand, the loyalty program stems from no danger of extensive or serious disloyalty in the civil service, for, at the most, there has been shown only desultory, isolated instances of persons belonging to proscribed organizations. Any threat that such persons might create is already the subject matter of laws safeguarding against the civil servant who is disloyal. It is unlawful for a federal employee to be a member of "any political party or organization which advocates the overthrow of our constitutional form of government in the United States" (5 U. S. C. § 118j; see also 18 U. S. C. § 2385). And as any other citizen, the civil servant can be prosecuted if he commits, attempts to commit (18 U. S. C. §§ 2385, 2387), or conspires to commit (*id.*) treason (18 U. S. C. § 2381), sedition (18 U. S. C. § 2384), sabotage (18 U. S. C. § 2151 ff.; 50 U. S. C. § 31), correspondence with a foreign power (18 U. S. C. § 953), or the disclosure of secret documents (18 U. S. C. § 1905; 42 U. S. C. § 1810(b); 50 U. S. C. § 31). In addition the various states have enacted measures which regulate and punish treasonous or seditious activity. Groner, *State Control of Subversive Activities*, 9 *Fed. Bar Journal* 61. Efficient federal and state police investigation and enforcement of these penal statutes would provide adequate protection. The "present federal loyalty program" has, therefore, been correctly characterized "both as unnecessary and unfair." American Civil Liberties Union, *Our Uncertain Liberties* (1948), p. 23. It realizes the possibility in the dictum that

"our whole civil liberties history provides us with a clear warning against the possible misuse of loyalty checks to inhibit freedom of opinion and expression." President's Committee on Civil Rights, *To Secure These Rights* (1947), p. 50. Deleterious to the morale, independence and integrity of our civil service,* productive of a dangerous political secret police system, and deferential to the principle of guilt by association, the over-all loyalty program is unconstitutional as an unreasonable means employed to meet an unreal and insubstantial evil.

But whatever justification may exist for the wholesale investigation of civil service employees, there is no basis in the history of the Executive Order or elsewhere for according to the Attorney General the power here complained of, i. e., the unfettered power to designate organizations as "subversive."

In its report of 1942 to Attorney General Biddle, the Interdepartmental Committee, after investigating several thousand civil service employees, stated its conclusion that

"In all but a small residuum of the cases, the lead provided by the 'active indices' of front organizations has proved to be utterly worthless." H. R. Document 833, 77th Cong., 2d Sess. (1942), pp. 4, 27.

And the Attorney General further reported that "... it is now clear that the objective test of membership in a 'front' organization is thoroughly unsatisfactory" (*id.*, at p. 4).

The recommendation by the President's Temporary Loyalty Commission that the Attorney General have the power to designate a list of "subversive" organizations ap-

* "What anxieties of mind, what prolonged periods of worry, what restraint upon their initiative, will result from their knowledge that their private lives are being secretly investigated, no one can say. But neither can anyone assert that this shadow upon their activities, however intangible and subtle, will not act as a constraint upon their freedom and their sense of independence." O'Brian, "Loyalty Tests and Guilt by Association," 61 *Harvard Law Rev.* 592, 608; see also article in *N. Y. Herald-Tribune*, August 22, 1948, pp. 1, 2, indicating the intellectual restraints caused by the loyalty program.

pears for the first time close to the end of the Commission's Report (pp. 32, 38). It does not appear that any of the agencies contacted recommended to the Commission that the Attorney General have such power (Report, at 12-15), and the Report of the Commission nowhere discusses reasons why the Attorney General should be accorded such vast power. Moreover, neither the Report nor the Executive Order recommended or expressly authorized the Attorney General to publicize the list. In fact, the publication of the list by the Attorney General came only after a great deal of vacillation and indecision. Soon after the Executive Order was promulgated requests were made of the Attorney General that the list which he would compile be made public. *N. Y. Times*, March 26, 1947, p. 27, col. 7; April 12, 1947, p. 19, col. 5. At first the Justice Department expressed doubt that the list would ever be made public; "they fear such action would put listed organizations on their guard and lead them to change their names, thus making necessary a whole new inquiry." *N. Y. Times*, April 13, 1947, p. 10, col. 1. On May 10, 1947 the Attorney General publicly stated that he was not decided as to whether the list would be made public. *N. Y. Times*, May 11, 1947, p. 35, col. 3. About three weeks thereafter the Attorney General publicly announced that the list would be published in thirty days in order to "enable investigators to trace suspected disloyal federal employees from membership in organizations branded as subversive." *N. Y. Times*, June 1, 1947, p. 38, col. 3. Almost six months later the list was published. Another six months later a second, supplementary list was published. *N. Y. Times*, May 29, 1948, pp. 1, 8.

The power of the Attorney General under the Executive Order has been criticized on the floor of the Congress (93 Cong. Rec. 8007, 9119, 9121, 9136, 9140, 9144, 9152; see also H. R. 6219, 6220, 95 Cong. Rec. 13540), by students of the Executive Order (*e. g.*, Notes, 96 *U. of*

Penn. Law Rev. 381, 394, 395; 47 *Columbia Law Rev.* 1161, 1171, 1172; Emerson and Helfeld, "Loyalty Among Government Employees," 58 *Yale L. J.* 1; Durr, "Loyalty Order's Challenge to the Constitution," 16 *U. of Chi. L. Rev.* 298; Kaplan and Borden, "Validity of Loyalty Tests for Federal Employees," 36 *Calif. L. Rev.* 596; Donovan and Jones, "Program for a Democratic Counter-Attack to Communist Penetration of Government Service," 58 *Yale L. J.* 1211; O'Brian, "Loyalty Tests and Guilt by Association," 61 *Harv. L. Rev.* 592; Sherman, "Loyalty and the Civil Servant," 20 *Rocky Mountain L. Rev.* 381; Kaplan, "Loyalty Review of Federal Employees," 23 *N. Y. U. L. Q. Rev.* 437; Schrenk, "Constitutional Law—the President's Loyalty Order—Standards, Procedures and Constitutional Aspects," 46 *Mich. L. Rev.* 942; Fraenkel, "Some Current Civil Liberties Problems," 18 *Brooklyn L. Rev.* 12; Merriam, "Some Aspects of Loyalty," 8 *Pub. Adm. Rev.* 81), by educators (e. g., *N. Y. Times*, April 13, 1947, p. 8E, col. 5-7; *N. Y. Times*, November 27, 1947, p. 38, col. 4; Cushman, "The President's Loyalty Purge," 36 *Survey Graphic* 287 (May, 1947); Commager, "Who is Loyal to America?" *Harpers*, 193-199 (April, 1947)), and by eminent members of the Bar (*N. Y. Times*, September 30, 1948, p. 15, col. 1). Still there nowhere appears any statement by any responsible officer of the Government of the necessity or justification for empowering the Attorney General to pass judgment upon the orthodoxy of organizations.

The use of membership, affiliation or sympathetic association with a designated organization as one of the Executive Order standards for determining employee loyalty is inadequate as a foundation for the extraordinary powers the Attorney General exercised under the Executive Order. It has been repeatedly stated by President Truman (*N. Y. Times*, November 15, 1947, p. 2, col. 2) and the defendants Richardson and Clark (*N. Y. Times*, December 23, 1947,

p. 28, col. 2; see also 13 Fed. Reg. 253, 254 (1947)) that the foregoing standard is "only one piece of evidence." If the Attorney General is authorized to declare any organization "subversive" merely to provide "only one piece of evidence," the disproportion between purpose and power, between the necessity for the power and the resultant injury, is so great that the grant of power to the Attorney General must be held invalid as unreasonable.

To the extent that the Attorney General's power under the Executive Order is to give content to a standard which is more than just "one piece of evidence," the power is invalid in that it is dedicated to a purpose which is unconstitutional. The Attorney General's power is basically an implement for a standard which is premised upon the abhorrent principle of guilt by association. That principle has met with uniform judicial repudiation. *Herndon v. Lowry*, 301 U. S. 242, 260; *Schneiderman v. United States*, 320 U. S. 118, 154; *Bridges v. Wixon*, 326 U. S. 135, 147; *Kotteakos v. United States*, 328 U. S. 750, 772; *United States v. Hauck*, 155 F. 2d 141, 144; President's Committee on Civil Rights, *To Secure These Rights* (1947), p. 50; Chafee, *Free Speech in the United States* (2 ed. 1941), pp. 167, 470, 484. If the grant of power is to effectuate the implementation of that principle, it is constitutionally defective.

Moreover, the application of guilt by association under the loyalty program results in the punishment of civil servants for their private opinions, beliefs, thoughts, and attitudes. Such punishment, unconstitutional in the instance of private citizens, is similarly invalid so far as public employees are concerned. For there is no exception which would warrant the punishment of civil service employees for their thoughts and opinions. See *Ex Parte Garland*, 4 Wall. (U. S.) 333, 378; *United States v. Thayer*, 209 U. S. 39, 42. In *United Public Workers v. Mitchell*, 330 U. S. 75, this Court not only recognized freedom of

thought and opinion of civil service employees but also expressly reserved to such employees freedom of expression.

“Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success.” (330 U. S., at p. 110.)

The Attorney General's power of designation, which was granted in order to effectuate a standard whereby civil servants may be punished for beliefs only, is premised upon a purpose which is not only insufficient to warrant the unprecedented powers of the Attorney General but also in violation of the basic principles of the First Amendment.

C

Executive Order 9835 Violates the Fifth Amendment in That Organizations Are Designated Thereunder Without Due Process of Law

It is the basic contention of the petitioner that the power resides nowhere, and particularly not in the Attorney General, to declare an organization as “subversive” under the vague and undefinable standards contained in Executive Order 9835. But if that power be deemed to exist, and, further, if that power be deemed to reside in the Attorney General, then it is urged that the absence of essential safeguards surrounding the exercise of that power violates the Due Process Clause of the Fifth Amendment.

This Court has recently defined the minimum guarantees contained in the Due Process Clause:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U. S. 257, 273.

These various guarantees apply to administrative action under the requirement that parties directly affected by such action are entitled to a fair hearing, including the right to notice, to be heard, to hear and test the evidence presented, and to decisions based upon the evidence. *Morgan v. United States*, 301 U. S. 292, 304 U. S. 1; *Opp Cotton Mills v. Administrator*, 312 U. S. 126; *Chicago Junction Case*, 264 U. S. 258, 263; *I. C. C. v. Louisville & N. R. Co.*, 227 U. S. 88, 91, 92, 93; *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U. S. 292. The right to a fair hearing is deemed particularly essential where, as here, the rights affected are not only property rights but personal and civil liberties guaranteed by the Bill of Rights. *Bridges v. Wixon*, 326 U. S. 135; *Ng Fung Ho v. White*, 259 U. S. 276; *Wong Wing v. United States*, 163 U. S. 228. In *Walker v. Popenoe*, 80 App. D. C. 129, 149 F. 2d 511, it was held that the barring of a publication from the mails as obscene without a notice or hearing was a denial of due process. The concurring opinion therein stated:

"In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas of due process implicit in the Fifth Amendment."

"There are no absolute and enduring standards of what is obscene . . . The determination of whether a publication violates such changing standards is certainly one which should not be undertaken without a hearing" (149 F. 2d, at 513, 514).

The constitutional necessity for hearings here is not affected by the circumstance that the Attorney General's action consists of the designation of organizations rather than the adjudication of a dispute. In *Shields v. Utah Idaho Central RR Co.*, 305 U. S. 177, it was observed with respect to the hearings which preceded the Interstate Commerce Commission's designation of a railway as a non-interurban electric railway:

"And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist" (305 U. S., 182).

The constitutional provision that Congress shall enact no bill of attainder prevents the Congress from trying and adjudging a man or an organization as "disloyal"; this prohibition derives from the necessity that such an adjudication can be made only after a full and fair judicial trial. *United States v. Lovett*, 328 U. S. 303. It would be anomalous, if in the face of the multiple constitutional procedural safeguards imposed upon judicial or legislative action which results in a stigmatizing official judgment, the executive branch, governed by the Due Process Clause of the Fifth Amendment, could find and brand an organization as "subversive" without affording that organization any one of the processes of defense dictated by the most elementary considerations of fair play or due process. At the very least, petitioner was entitled to the hearings and other safeguards afforded by the United States to German organizations before they were declared to be illegal at the war crimes trial. *Nurnberg Trials*, 6 F. R. D. 68, 111-112, 131-132, 160-167, 180, 182, 187; *N. Y. Times*, May 4, 1947, p. 10E, col. 5. The determination of political orthodoxy is vulnerable to sufficient abuse without removing from that determination the proper restraints imposed by a fair hearing. *In re Oliver*, 333 U. S. 257, 268. "... .

injustices flourish where procedural requirements are relaxed." DOUGLAS, J., "Procedural Safeguards in the Bill of Rights," 31 *Amer. Jud. Soc. J.* 166, 168.

No special exigencies here exist which require that the JAFRC be denied its constitutional right to a hearing. There is no emergency which makes it impossible to expend the time which may be necessary for a fair hearing. Cf. *Lawton v. Steele*, 152 U. S. 133; *Hirabayashi v. United States*, 320 U. S. 81. And the need to maintain the secrecy of informants or sources of information, as the basis for depriving the JAFRC of a hearing, is no more persuasive here than in the trial of any charge based upon secret information. *Kwock Jan Fat v. White*, 253 U. S. 454, 459; *Colyer v. Skeffington*, 265 F. 17; *Chew Hoy Quong v. White*, 249 F. 869. Nor should hearings and findings here be dispensed with because of any assertion which may be made that many organizations have covert objectives and methods which make more formal proof of their "subversive" nature too difficult. For if proof cannot be obtained by an efficient police system as to subversive methods or objectives how then can civil service employees be discharged for the barest contact or sympathetic association with organizations which are so successful in secreting their purposes and methods?

The constitutional requirement that organizations are entitled to a full and fair hearing before they may be designated by the Attorney General has, apparently, been recognized even by the House Committee on Un-American Activities. In a recent report by a subcommittee thereof, it was stated in connection with a proposed bill which would require the registration of organizations:

"The bill provides for administrative hearings in the Department of Justice in those cases where Communist Party front organizations refused to register voluntarily. During this hearing the organization will be given an opportunity to present witnesses in

its own behalf, as well as being provided with other safeguards. Full judicial review of the findings of the Attorney General is provided. The subcommittee believes that this provision constitutes a landmark in that it provides for the establishment of proper legal procedures which will eventually replace the *ex parte* findings under the present loyalty order." Report of the Subcommittee on Legislation of the Committee on Un-American Activities (1948), p. 5.

It is submitted that "*ex parte* findings" and the absence of "proper legal procedures . . . under the present loyalty order" constitute the Executive Order a violation of the Due Process Clause of the Fifth Amendment.

D

The Issues Here Presented Are Justiciable

The uncontroverted complaint and affidavits submitted by petitioner allege that as a result of certain wrongful acts of the respondents, substantial property and constitutional rights of the JAFRC and its members have been and will continue to be impaired; that those acts were purportedly done pursuant to Executive Order 9835; that the Order is unconstitutional; and that the relief sought will mitigate the wrongful injuries already inflicted and will prevent the threatened injuries from eventuating.

The Court below ruled, however, that the foregoing record presented no justiciable controversy in that the action of the respondents imposed "no obligation or restraint" upon the petitioner but was merely the furnishing "of information and advice" which injured the JAFRC only "incidentally" or "indirectly."

It is a basic principle of equity jurisdiction that unauthorized action by a public official causing injury to a legally protected right gives rise to a justiciable issue ir-

respective of whether that action consists of some express compulsion or deprivation. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Waite v. Macy*, 246 U. S. 606; *Red Canyon Sheep Co. v. Ickes*, 69 App. D. C. 27, 98 F. 2d 308. Action by a public official based on no valid authority and causing injury to a legally protected right is within equitable cognizance. *Philadelphia Company v. Stimson*, 233 U. S. 605; *Ex Parte Young*, 209 U. S. 123; *Hays v. Seattle*, 251 U. S. 233; *Bell v. Hood*, 327 U. S. 678, 684; see *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U. S. 118, 137. It is immaterial that the injury to the JAFRC was occasioned by publicity and respondents' conduct did not assume the more formal, orthodox and traditional forms of governmental action. The development of new techniques of governmental action should not put a party out of court. The peculiar genius of equity jurisdiction is its flexibility and its adaptability, for the safeguarding of individual rights, to new modes of governmental action. It is imperative that equity principles be applied to the publicity technique which has been increasingly employed by government as a sanction or regulatory device. For ostracism is a damaging penalty and a potent deterrent. The Constitution itself is replete with safeguards with respect to official judgments which would cause the party judged to be socially or politically ostracized. *United States Constitution*, Article I, §§ 3 (cl. 6, 7), 9 (cl. 3), 10 (cl. 1); Article III, §§ 2 (cl. 3), 3; Amendment V; Amendment XIV, § 3. The status of publicity as an instrument of governmental action, generically identical with imprisonment, fines, licensing powers and other sanctions, has come to be recognized. See, e. g., Landis, *The Administrative Process* (1938), pp. 90, 108-110; President's Committee on Civil Rights, *To Secure These Rights* (1947), p. 52; Commissioner of Investigation of the City of New York, *Annual Report* (1938), p. 13; I'avis, "The Administrative Power of Investigation," 56 *Yale Law Journal* 1111, 1136; Note, "Constitu-

tional Limitations on the Un-American Activities Committee," 47 *Columbia Law Rev.* 416, 418. VINSON, C. J., in *Glass v. Ickes*, 72 App. D. C. 3, 117 F. 2d 273, cert. den., 311 U. S. 718, quoted *United States v. Birdsall*, 233 U. S. 223, 231, and declared that "Public announcements may well, on occasion, be 'an action which may properly constitute an aid in the enforcement of the law'" (117 F. 2d 277, n. 9). And in *Barsky, et al. v. United States*, 167 F. 2d 241, publicity and "exposure" occasioned by a Congressional committee were treated as a type of governmental action capable of impairing rights guaranteed under the First Amendment.

If the designation of the JAFRC as "subversive" had been uttered by a private individual it would plainly have been justiciable and, indeed, actionable *per se*. *Grant v. Readers Digest Association*, 151 F. 2d 733, cert. den. 326 U. S. 797; *Mencher v. Chesley*, 297 N. Y. 94; *Kaminsky v. American Newspapers, Inc.*, 283 N. Y. 748; *Spanel v. Pegler*, 160 F. 2d 619; *Wright v. Farm Journal*, 158 F. 2d 976. The circumstance that the utterance was by a public official does not make the wrong committed and the injury resulting therefrom any less justiciable; questions of privilege (see pp. 74-76, *infra*) or reviewability (see pp. 68-73, *infra*) may arise from that circumstance, but in no action brought against an official for a stigmatizing utterance has the justiciability of the controversy been doubted. See, e. g., *Spalding v. Vilas*, 161 U. S. 483; see also 48 *Columbia Law Rev.* 1050, 1057. In fact, as the defamatory characterization of petitioner is a label attached and disseminated by an official agency of government, the prestige and the power behind the agency cause that label to have a more damaging effect than is inherent in the label itself. It was pointed out by LEARNED HAND, J., that where "the hearer is in his power" the language of the speaker may "have a force independent of persuasion." *National Labor Relations Board v. Fiederbush Co.*, 129 F. 2d 954, 957; see also Note, 43 *Columbia Law Rev.* 837, 942-943.

This Court has plainly indicated its awareness that the dissemination of a stigmatizing official judgment by an agency of government is to be subject to the limits imposed upon other forms of government action. In *Keegan v. United States*, 325 U. S. 478, the Court had before it a section of the Selective Service Act which provided that it was "the express policy of the Congress" that vacancies caused in private employment by induction "shall not be filled by any person who is a member of the Communist Party or the German American Bund" (50 U. S. C. App. § 308(i)). No further compulsion or sanction was contained in that section. The Government conceded that the aforesaid provision was unconstitutional, but maintained its unconstitutionality could be ignored on the grounds that the aforesaid provision was a mere "admonition." Mr. Justice BLACK, in a concurring opinion, disposed of this contention very briefly.

"It has been urged that these defendants had no legitimate reason to protest against these provisions because they were obviously unconstitutional and amounted to no more than an admonition; but they were an admonition sounded by the highest legislative body of the nation" (325 U. S., 496). (Italics added.)

And thereafter Mr. Justice BLACK indicated that the aforesaid provision violated the Bill of Attainder prohibition of the Constitution.

In *United States v. Lovett*, 328 U. S. 303, the Congress provided:

"in § 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House Bill; that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 14, 1943 again appointed to jobs by the President

with the advice and consent of the Senate" (328 U. S., 305).

The Congressional Counsel urged that no justiciable constitutional issue was presented in an action by respondents to recover salaries earned but not paid. The argument was rejected and the statute involved was thereafter held to be unconstitutional.

"Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result" (328 U. S., 316). (Italics added.)

Respondents' action was not only justiciable as the publication of a "blacklist" calculated to frustrate legitimate First Amendment activities of designated organizations,* it is also justiciable because it had the effect of fixing the status of the JAFRC as a "subversive" organization for the purpose of future administrative action. The Order provides that the list of designated organizations is to be disseminated to agencies established to pass upon employee loyalty (Part III, § 3), and those agencies are instructed to utilize that list (Part V, § 2(f)). The Loyalty Review Board has ruled that local Loyalty Boards in the administration of Executive Order 9835 are not to "enter upon any evidential investigation . . . for the purpose of attacking, contradicting or modifying the controlling conclusion reached by the Attorney General" as to the designation of an organization. Memorandum No. 2 of the Civil Service Commission Loyalty Review Board, March 9, 1948; see also Memorandum No. 12, June 23, 1948. In this manner

* Prior to the publication of the list, the Attorney General was requested to make public his list of "subversive" organizations to protect the public in order that "they could refrain from joining or contributing funds to them." *N. Y. Times*, March 28, 1947, p. 27. The complaint alleges and it is undenied that the designation of petitioner by the Attorney General has caused contributors, patrons, members and volunteer workers to rupture their connection with the JAFRC (R. 7).

the status of the JAFRC is finally and irrevocably fixed by the Attorney General's list as a "subversive" organization in the administration of the "loyalty program."*

Such fixation of status, for the purpose of future administrative regulation, creates a justiciable controversy although it does not direct any present or future action or inaction on the part of the complaining party.** Cf. *Rochester Tel. Corp. v. United States*, 307 U. S. 125. The test is whether the determination results in injury to the complaining party.

In *Shields v. Utah Idaho Central Railway Co.*, 305 U. S. 177, it was held that the determination by the Interstate Commerce Commission that a certain railway was not an interurban electric railway was the basis for review in a court of equity. Although the designation of the railway by the Commission was not reviewable as an order (*Shannahan v. United States*, 303 U. S. 596), and although the designation was not made "for the purpose . . . of further proceeding by the Commission itself" (305 U. S., 183), the action was nevertheless entertained for the reason that the designation was "part of a reorganization scheme" under the Railway Labor Act (*id.*)*** and for the further reason

* The list also had the effect of fixing the status of the JAFRC for other purposes. In one instance the JAFRC found that the Bureau of Internal Revenue declared the organization to be non-tax-exempt (*N. Y. Times*, February 3, 1948, p. 21 (R. 26); see also *N. Y. Times*, October 22, 1948, p. 17, col. 1, for additional listed organizations which lost tax-exemptions). Upon another occasion it was administratively determined that in view of the petitioner's inclusion on the list submitted to the Loyalty Review Board by the office of the Attorney General prepared under Part III, Section 3 of the President's Executive Order 9835, the organization could not be deemed a proper one by the Pennsylvania Department of Welfare for registration for a certificate to solicit funds (R. 28).

** Under the Administrative Procedure Act of 1946, any person injured by "agency action" may seek judicial review thereof (Section 10(a)). "Agency action" includes any agency rule (Section 2(g)) which has been defined as "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" (Section 2(c)) (italics added). It is plain that the listing of the JAFRC is judicially reviewable and therefore justiciable under the Administrative Procedure Act.

*** Compare this aspect of the *Shields* case with the utilization of the Attorney General's designation by the agency loyalty boards and the Loyalty Review Board.

that the applicability of other legislation to the railway was premised upon "the same criterion" of whether it was an interurban railway (305 U. S., 184).*

"In these circumstances we think respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status" (305 U. S., 184).

In the recent case of *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18, this Court held that the designation of a union as a "bargaining agent" could give rise to a justiciable controversy although that certification did not order any action or inaction by the complaining employer and although that certification might be reviewed and set aside in a subsequent administrative or judicial proceeding:

"The fact that Wisconsin's certification was not in the form of a command is immaterial. See *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 408. It was not an abstract determination of status. Nor was it merely an interim adjudication in an uncompleted administrative process. It established legal rights and relationships. It told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions. The character of the certification was therefore such as to make it reviewable under the appropriate standards for exercise of the federal judicial power" (336 U. S., 23-24).

The decisive applicability of *Columbia Broadcasting System v. United States*, 316 U. S. 407, to the case at bar has been recently noted as follows:

"In that case the Federal Communications Commission had issued an announcement of general policy

* Compare this aspect of the *Shields* case with the utilization of the Attorney General's designation by other agencies such as the Bureau of Internal Revenue and state licensing agencies.

which was to govern the renewal of station licenses. Stations renewing long-term 'bloc-time' contracts with radio networks would not obtain license renewals from the Commission. As a result, many stations refused to renew their contracts with the plaintiff network, and it sought an injunction restraining the Commission from adhering to its proposed standard. The Supreme Court recognized that despite the generality of the policy announcement, and even though it did not directly deny or cancel licenses, its necessary effect, as a result of the combination of present announcement and the existence of potential regulatory power, was to regulate. The announcement was therefore deemed to be present regulation.

"The analogy between the action taken by the Attorney General and that taken by the Federal Communications Commission in the *Columbia Broadcasting System* is clear. In both cases there is a present announcement of criteria for the future exercise of regulatory power. In neither case is there any certainty that the regulatory power will in fact be exerted, but in both cases the plaintiff has suffered present damages. Since the Attorney General's action thus constitutes regulation, it falls within one of those categories of action which are capable of invading legal rights. . . ." Note, 48 *Columbia Law Review*, 1050, 1053-1054; see also Emerson and Helfeld, "Loyalty among Government Employees," 58 *Yale Law Journal* 1, 119, 120.

As the designation of the JAFRC by the Attorney General is final and binding, particularly so far as the administration of the loyalty program is concerned, the listing of the JAFRC is more than a statement which is merely defamatory or deprecatory in nature. It is an adjudication on the basis of which sanctions of the gravest type can be and are imposed. It fixes the status of the JAFRC finally for loyalty purposes and it informs every civil servant that membership in, affiliation with, or sympathetic association with the organization exposes that civil servant to

dismissal for disloyalty. Indeed, the principal purpose for the publication of the "list" was to put civil service employees and applicants on notice that, "association" with the JAFRC will result in ineligibility. See H. R. Report 616, 80th Cong., 1st Sess. (1947), p. 4. Under pain of loss of job and the stigma of disloyalty, no present or prospective civil servant can venture to maintain the barest connection with the JAFRC. The action of the Attorney General is therefore no administrative report or investigatory finding—it is a determination enforceable by governmental action and sanctions. According to *Columbia Broadcasting System v. United States*, the justiciability of such a determination is beyond dispute, even though that determination does not directly command action or inaction by the complaining party.* As the administrative rule in the *Columbia Broadcasting System* case caused the parties directly governed by the rule to sever their relationships with the complaining party under threat of future governmental sanctions or action, so the designation of the JAFRC by the Attorney General has caused present or prospective civil servants to sever their connection with the JAFRC under the threat of future dismissal by the Government; in short, as the FCC rule created a justiciable issue in the *Columbia Broadcasting* case, so the action of respondents has resulted in a justiciable issue.

The Court below failed to discuss or distinguish the *Columbia Broadcasting System* case but instead relied upon *Standard Se'ie Co. v. Farrell*, 249 U. S. 571, where

* It has been repeatedly held, in contrast with the ruling below, that a statute or an administrative ruling may be challenged by an individual who has not thereby been commanded to perform or refrain from any acts where that statute or ruling adversely affects the interests of the complaining party because it directs or induces others to action injurious to the complaining party. *Stark v. Wickard*, 321 U. S. 288, 303; *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Pierce v. Society of Sisters of Holy Names*, 268 U. S. 510; *Buchanan v. Warley*, 245 U. S. 60; *Truax v. Raich*, 239 U. S. 33; *Martin v. Struthers*, 319 U. S. 141, 146. And the standing of the complaining party is not affected by the fact that the relationship thus impaired is one terminable at will (see, e. g., *Truax v. Raich*, *supra*; *Pierce v. Society of Sisters of Holy Names*, *supra*); it is sufficient that the impairment of the relationship results in loss to the complaining party.

it was held that publication and distribution of a bulletin by the New York Superintendent of Weights and Measures was not state action subject to the limitations of the Fourteenth Amendment.*

The *Farrell* case does not govern here. In the *Farrell* case the complainant, a scale manufacturer, challenged a finding by the State Superintendent that certain types of scales were defective. The distinctions between this situation and the case at bar are manifold: (1) the finding in the *Farrell* case was "generic" (249 U. S., 547) and did not specifically refer to the complainant's scales as the Attorney General referred to the JAFRC by name; (2) the superintendent's action did not affect any of the preferred constitutional rights such as freedom of expression or association; and (3) the superintendent's findings were not a binding determination, as the list of the Attorney General is conclusive upon loyalty program and other administrative agencies, for the purpose of subsequent governmental action. Moreover, as was stated by Mr. Justice BRANDEIS at the outset of the *Farrell* decision:

"No question is made as to the constitutionality of the statute creating the office of state superintendent and defining his duties" (279 U. S., 573).

Only the particular action complained of was put in issue. While the issuance of a publication (*Standard Scale Co. v. Farrell*, 249 U. S. 571), the recommendations of a labor board (*Pennsylvania R. Company v. Labor Board*, 261 U. S. 72; *Employers Group v. N.W.L.B.*, 143 F. 2d 145, cert. den., 323 U. S. 735; *N.W.L.B. v. United States Gypsum Co.*, 145 F. 2d 97, cert. den., 324 U. S. 856), and assessments (*United States v. Los Angeles & S. L. R. Co.*, 273

* The *Farrell* case has frequently been cited for the proposition that state action is reviewable regardless of the form it assumes. See, e. g., *King Manufacturing Co. v. Augusta*, 277 U. S. 100, 104, 126; *Starr & Co. v. Commissioner of Internal Revenue*, 101 F. 2d 611, 614; *United States v. Estep*, 150 F. 2d 768, 777.

U. S. 299) were held not to be governmental action giving rise to a justiciable issue, a challenge to the validity of the authority pursuant to which such publication, recommendation or assessment was made would give rise to a justiciable issue. Thus, in *Ex Parte Williams*, 277 U. S. 267, Mr. Justice BRANDEIS expressly indicated that while an assessment does not create a justiciable issue, if a "question as to the validity of the taxing statute which authorized that assessment" had arisen, a justiciable question would have been presented (277 U. S., 271). Consequently, although petitioner's standing here is predicated upon the inclusion of the JAFRC in the Attorney General's list, it is decisive that the petitioner challenges the constitutionality of the Executive Order which authorizes the issuance of the list. And since that Executive Order is plainly governmental action, irrespective of the characterization which may be assigned to the list itself, neither the *Farrell* case nor any other authority renders non-justiciable a dispute as to the constitutionality of the Order.

United States v. Los Angeles & S. L. R. Co., 273 U. S. 299, cited and relied upon below, was an action to enjoin and annul an ICC order determining the valuation of the property of the petitioner. The petitioner claimed that the valuation was unconstitutional and had caused the petitioner irreparable injury. The Court held that the order of valuation was not reviewable. In the course of his opinion, Mr. Justice BRANDEIS pointed to several characteristics of the assessment which distinguished it from the action here complained of.

In the first place, the investigation "was not a step in a pending proceeding" and "was merely preparation for possible action in some proceeding which may be instituted in the future" (273 U. S., 310), as compared with the binding designation of organizations by the Attorney General, the use of which is not merely optional and dependent upon some "possible" "future" "proceeding"

but which necessarily and in fact has been employed in the loyalty proceedings conducted under Executive Order 9835.

Moreover, the valuation was to constitute *prima facie* evidence only of the value in subsequent proceedings and established only a rebuttable presumption (273 U. S., 311, 312), as compared with the determination of the Attorney General which is final, binding and irrevocable in the subsequent proceedings wherein that determination is employed.

Again, while "Congress . . . provided adequate remedies for the correction of errors in the final valuation and classification thereof" (273 U. S., 312-313), there is absolutely no procedure within the administration of the loyalty program whereby a designated organization may be heard in advance of its designation or whereby it may subsequently accomplish any changes or revision in the designation.

The various early War Labor Board cases cited similarly fail to sustain the ruling below.

Pennsylvania R. Company v. United States R. Labor Board, 261 U. S. 72, never reached the question whether a Railway Labor Board order was justiciable. On the contrary, to the extent that the case considered and decided whether the Labor Board acted within its statutory jurisdiction, this Court apparently assumed that an order enforceable only by moral suasion could create a justiciable issue.

Pennsylvania R. System v. Pennsylvania R. Company, 267 U. S. 203, was an action to enjoin the violation of a Railway Labor Board order and the issue there was not one of justiciability, but whether the order created an enforceable right or duty. And while the Court there held that no such enforceable right or duty was created by a Labor Board order, there is much language in the opinion

which suggests that governmental action which invokes the sanction of public opinion may be considered as similar to any other type of governmental action (see 267 U. S., 216).

None of the more recent War Labor Board cases cited (*Employers' Group, etc. v. NWLB*, 143 F. 2d 145, cert. den. 323 U. S. 735; *NWLB v. United States Gypsum Co.*, 145 F. 2d 97, cert. den. 324 U. S. 856) is here applicable, for each of those cases was decided on the grounds that the Congress had specifically intended that War Labor Board orders not be reviewable. See, particularly, *Employers' Group, etc. v. NWLB, supra*. As the author of the leading War Labor Board case, *Employers' Group, etc., v. NWLB, supra*, pointed out in his dissent herein, the administrative rulings in those cases "were not enforceable against anybody, were not defamatory, and caused no loss" (R. 48) as distinct from the final and binding determination and pronouncement by the Attorney General that the JAFRC is a "subversive" organization. Moreover, since each of those cases involved the correctness of War Labor Board decisions rather than the constitutionality of the authority under which the War Labor Board acted, none of the cases is determinative of the case at bar.

This Court in the *Columbia Broadcasting System* case established that an administrative rule promulgated to govern future decisions by that administrative agency gives rise to a justiciable controversy at the instance of a party not governed by that rule but injured as a consequence of private action by those parties who are subject to the rule. The decision thus reached by this Court in the *Columbia Broadcasting System* case is here plainly applicable—indeed, since the action of the Attorney General in the instant case possessed the additional feature of a defamatory characterization, the controversy here involved is even more clearly justiciable than that in the *Columbia Broadcasting System* case. The Court below, in its opinion, failed to discuss or otherwise distinguish the *Columbia*

Broadcasting System case, but instead, relied upon other inapplicable decisions of this Court to arrive at a conclusion inconsistent and in conflict with the decision in *Columbia Broadcasting System, supra*.

E

Executive Order 9835 and the Actions of Respondents Thereunder Are Reviewable

The rights of the JAFRC here impaired are not only recognized property rights, but also include constitutional rights of freedom of thought, expression and association;* and the wrong committed was not merely an error in "the exercise of official discretion," but the assertion of a power which exceeds the constitutional power of the Executive.** Such circumstances have traditionally been deemed sufficient to invoke equity jurisdiction. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619; *Ickes v. Fox*, 300 U. S. 82, 96, 97; *Ex Parte Young*, 209 U. S. 123. But the Court below held that the Attorney General here acted as the *alter ego* of the President and that the action of the Attorney General was as non-reviewable as the action of the President would have been if he had acted himself (R. 38).

This is not an action against the President of the United States. He is not named as a party nor is he an indispensable party to the action. The circumstance that he promulgated Executive Order 9835 no more renders this a suit against the President than the circumstance that the Congress enacts a law renders a suit challenging the

* *Perkins v. Lukens Steel Co.*, 310 U. S. 113, cited below, did not involve the impairment of a legally protected property or constitutional right and is, therefore, inapposite here; and *Friedman v. Schwellenbach*, 81 App. D. C. 365, 159 F. 2d 22, cert. den., 330 U. S. 838, is likewise of no force here since the plaintiff's status was merely that of a temporary, conditional civil servant.

** *Devatur v. Paulding*, 14 Pet. (U. S.) 497, is a typical instance wherein an alleged error in a matter resting in the administrator's discretion was held non-reviewable.

validity of that law a suit against the Congress. Indeed, as Executive Order 9835 has distinctively legislative features,* the analogy suggested is particularly appropriate. Cf. *Ex Parte Endo*, 323 U. S. 283, 298-300.

It has never heretofore been held that the action of a cabinet officer is non-reviewable as the action of the President. In fact, instances abound in which equity jurisdiction has been exercised over such cabinet officers. See, e.g., *Philadelphia Co. v. Stimson*, *supra*; *Ickes v. Fox*, *supra*; *Waite v. Macy*, 246 U. S. 606. That jurisdiction does not dissipate because the wrong or constitutional excess committed by the executive officer is the exercise of executive power derived from the Constitution as compared with power delegated by the Congress. The doctrine of the supremacy of law had its inception, in Anglo-American law, in the subjection of the Executive to judicially defined legal limits. 2 Holdsworth, *History of English Law* (3 ed. 1923), p. 255; Pound, *Spirit of the Common Law*, pp. 60, 67, 69. *Case of the Monopolies*, 11 Coke, 846 (K. B. 1603); *Præambles del Roy*, 12 Coke, 63 (1610). In *Hurtado v. California*, 110 U. S. 516, 531-532, this Court declared:

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial."

Similarly, one authority has observed:

"Within the sphere of his authority under the Constitution, the Executive is independent, and judicial process cannot reach him. But when he exceeds his authority, or usurps that which belongs to

* The Rees Bill (H. R. 3818, 80th Cong., 1st Sess. (1947)) was identical with Executive Order 9835 except in respects not here material.

one of the other departments, his orders, commands, or warrants protect no one, and his agents become personally responsible for their acts. The check of the courts, therefore, consists in their ability to keep the Executive within the sphere of his authority by refusing to give sanction of law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability." Cooley, *Constitutional Law* (4 ed. 1931), p. 203.

This Court has very recently indicated the test applicable to the determination of the validity of the exercise of executive power which is derived from the Constitution.

"We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Ex Parte Endo*, 323 U. S. 283, 299-300.

And, accordingly, it appears that the constitutionality of executive agreements, as of treaties, is a proper subject of judicial review. *United States v. Pink*, 315 U. S. 203;

Littauer "*The Unfreezing of Foreign Funds*" 45 *Columbia Law Rev.* 132, 160-169; Note, 48 *Columbia Law Rev.* 890; 897. Even with respect to the Executive's vast war powers, it is "well established" that "what are the allowable limits . . . are judicial questions." *Sterling v. Constantin*, 287 U. S. 378, 401; see also *Duncan v. Kahanamoku*, 327 U. S. 304; *Ex Parte Quirin*, 319 U. S. 1; *Scherzberg v. Maderia*, 57 F. Supp. 42; *Ebel v. Drum*, 52 F. Supp. 189.

It is, therefore, not surprising that, upon occasion, the action of executive officers exercising power purportedly derived from Article II of the Constitution (rather than power delegated by the Congress) has been held by this Court to be invalid. Thus in the great ruling in *Ex Parte Milligan*, 4 Wall. (U. S.) 2, the action there held violative of the Constitution was that of an executive officer acting pursuant to a mandate of the President as Commander-in-Chief. And in *Humphrey's Executor v. United States*, 295 U. S. 602, this Court deemed invalid action by the President which was said to be an exercise of the inherent removal power of the Executive—the inherent executive power here asserted by respondents.

To the extent that Executive Order 9835 is, as stated in the preamble thereto, based upon the Civil Service and Hatch Acts and is the exercise of power delegated by the Congress to the President, it is evident that the exercise of that delegated power is the subject matter of judicial review. For if a Congressional enactment governing the activities of employees of the Federal Government may be directly reviewed upon a challenge to its constitutionality (see, e.g. *United Public Workers v. Mitchell*, 330 U. S. 75; *United States v. Lovett*, 328 U. S. 303), it of course follows that the delegation of power by the Congress to the Executive with respect to the federal civil service may also be the subject matter of judicial review (*Panama Refining Company v. Ryan*, 293 U. S. 388, 433).

To the extent that Executive Order 9835 is predicated upon some alleged executive constitutional power, the question of its constitutionality as presented in the instant case is a non-political and reviewable question. Here private property or other constitutional rights have been impaired to the detriment of the complaining party. Thus, while a political question may exist where "no case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill" (*Georgia v. Stanton*, 6 Wall. (U. S.) 50, 77), or where a state institutes an action as *parens patriae* on behalf of its citizens (*Massachusetts v. Mellon*, 262 U. S. 447), or where "the basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity" (*Colegrove v. Green*, 328 U. S. 549, 552), or where a group of senators institute an action complaining of the method of adopting an amendment to the United States Constitution (*Coleman v. Miller*, 307 U. S. 433), or where a Governor of one state seeks to compel the Governor of another state to extradite a fugitive from justice (*Kentucky v. Dennison*, 24 How. (U. S.) 66), a justiciable, reviewable, non-political question exists here where the complaining party bases its standing upon the impairment of a private property or constitutional right. See Rottschaefer, *Constitutional Law* (1939), pp. 69-70. Indeed, no other conclusion is permissible.

For if respondents herein should prevail in their assertion as to lack of jurisdiction, the JAFRC is remediless in the face of action which has concededly awful and devastating consequences upon constitutional rights of the JAFRC. It cannot sue in libel; no provision is made by the Order for a hearing before the Attorney General or anyone else for corrective purposes; nor does the political arena offer a real prospect of relief for the JAFRC and other listed organizations, especially since the actions of respondents, in labeling those organizations

as "subversive," have the intended and actual effect of diminishing or destroying any efficacy among the electorate that such organizations might possess. Cf. *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4. "Were this case to be not justiciable," executive action stigmatizing an entire organization "could never be challenged in any court. Our Constitution did not contemplate such a result." *United States v. Lovett*, 328 U. S. 303, 316.

Nor does the danger inherent in a finding that the question of the constitutionality of action under the Executive Order is non-justiciable end with the JAFRC and the other proscribed organizations. Part III, Section 3 and Part V, Section 2(f) of the Order may now allow, or could be amended to permit, the Attorney General to list religions or races as well as organizations. Of course Article VI, clause 3 as well as the Due Process Clause of the Fifth Amendment of the United States Constitution might thereby be infringed even more clearly than constitutional prohibitions are violated by the Order as it now stands. But justiciability and reviewability are not predicated upon the decree of unconstitutionality. If this Court is unable to consider the constitutionality of the present Order, it would be unable to consider the constitutionality of the hypothesized order. It is respectfully submitted that respondents may not escape judicial inquiry into the authority which they have asserted. Otherwise, the process of judicial review, which in this country is the cornerstone of constitutional government, may be circumvented upon every occasion when officials conceive some ingenious or novel mode of wielding power.

F

**The Complaint States a Cause of Action for Which
Relief Is Available**

The Court below held that the circumstance that the designation of the JAFRC "was disclosed to the public press presents no legal ground for relief" since "in the absence of a statute imposing secrecy, it cannot be supposed that the Courts have any power to regulate or control publication of matters concerning the government's business" (R. 39).

That there must be some limits to the use of the prestige and power of high public office to stigmatize individuals and organizations is plain. The Constitution places safeguards about stigmatizing official judgments (see p. 56, *supra*), yet only with respect to "Speech or Debate in either House" is it provided that "Senators and Representatives . . . shall not be questioned in any other place" (Article I, Sec. 6, Cl. 1). Of course, good reasons may be advanced for exempting public officials from liability in damages for matter spoken or written in connection with the performance of their duties; ". . . it would be unfortunate if all government officers were deterred from acting in doubtful cases by fear of later personal liability. . . ." Gellhorn & Schenck, "Tort Actions Against the Federal Government," 47 *Columbia Law Rev.* 722, 724. But the foregoing exemption has never been extended beyond actions for money damages. *Spaulding v. Velas*, 161 U. S. 483; *Mellon v. Brewer*, 57 App. D. C. 126, 18 F. 2d 168, cert. den., 275 U. S. 530; *Jones v. Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, cert. den., 314 U. S. 665; but see Gellhorn & Schenck, *op. cit. supra*, 738.

GRONER, C.J., has said of this exemption that "its cloak of absolute immunity offers such far reaching opportunity for oppression, that it manifestly ought not to be extended

beyond the impulse that gave it being" (*Glass v. Ickes*, *supra*, 117 F. 2d, p. 281). Thus, the inability to sue an officer of the Government in damages for matter written or spoken by him in connection with his duties does not preclude an action in equity where the matter written or spoken is widely disseminated and is utilized, as any other instrument of pressure available to government, to influence the activities of some individual or organization. For just as the inability to recover in damages from an official acting under an unconstitutional law* would, obviously, be no basis for denying injunctive relief against the enforcement of that law by that same officer,** so the inability of the JAFRC to recover damages from respondents is no basis for denying the relief here sought. Indeed, the absence of an adequate remedy at law is the necessary condition for this action in equity.

The absence of a remedy at law for damages; the non-penalizing effect of a suit in equity upon the free exercise of official discretion; and the need for enforcing limits to and responsibility for governmental pressures and compulsions which may be exerted through the medium of publicity*** all indicate that a cause of action in equity has here been stated.

In contrast with the ruling below, and in accord with petitioner's contention is the decision of this Court in *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, where the Commission indicated that cost and price reports filed by the Utah Fuel Company would be made public at a hearing of the Commission. The Com-

* *Bohr v. Barnett*, 144 F. 389; see, also, *Anniston Manufacturing Co. v. Davis*, 87 F. 2d 773, 780, *aff'd*, 301 U. S. 337; *Gladstone v. Galton*, 145 F. 2d, 742, 744; *Rottschaefer*, *Constitutional Law* (1939), p. 36.

** In *Jones v. Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, *cert. den.*, 314 U. S. 665, acts and proceedings which had been previously held to be unconstitutional (298 U. S. 1) were deemed to be inadequate to found an action in libel.

*** See Note, 43 *Columbia Law Rev.* 837, 942-943.

mission's determination had been held non-reviewable (306 U. S., 58), but in the injunction proceedings thereafter instituted against the Commission to restrain the disclosure of the cost and price information this Court finally held that equitable relief against the action of the Commission was available.

"Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other relief, we think complainants could properly ask relief in equity" (306 U. S., 60).

Similarly, in *Bank of America National Trust & Savings Association v. Douglas*, 70 App. D. C. 221, 105 F. 2d 100, an injunction was granted restraining the Securities & Exchange Commission from publicizing certain information obtained by it from the Secretary of the Treasury. In writing for his Court, GRONER, C.J., stated:

"We think the court had jurisdiction. The Bank alleged that disclosure of the information would result in irreparable injury. Since other remedy was entirely lacking, the cause was a proper one for equitable relief" (105 F. 2d, 102).

G

Petitioner Has Standing to Raise the Issues Here Presented

The Court of Appeals held that the JAFRC has no standing to complain of the deprivation of First Amendment rights on the grounds that "Those rights are personal to the individual members" (R. 40). The Court below was in error when it thus held that an unincorporated association may not assert the substantive or procedural rights guaranteed by the Due Process Clause of

the Fifth Amendment. In *Grosjean v. American Press Company*, 297 U. S. 233, this Court held:

"Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause.—*Paul v. Virginia*, 8 Wall. 168. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & L. Turnip, Road Co. v. Sandford*, 164 U. S. 578, 592; *Smyth v. Ames*, 169 U. S. 466, 522" (297 U. S., 244).

Again, in *Bridges v. California*, 314 U. S. 252, the Court sustained the rights to freedom of speech and press, under the Due Process Clause of the Fourteenth Amendment, asserted by corporations which were parties to that action. And in *Hannigan v. Esquire*, 327 U. S. 146, the Court indicated that a corporation could assert and rely upon the prohibitions contained in the First Amendment against the abridgement of freedom of the press. *Hague v. CIO*, 307 U. S. 496, cited and relied upon below, does not establish that the petitioner herein has no standing to assert rights arising under the Due Process Clause of the Fifth Amendment for that case was a determination under the Privileges and Immunities Clause rather than the Due Process Clause of the Fourteenth Amendment.

Moreover, the basic premise that the petitioner is asserting some right of the organization as distinct from the rights of its members, contributors and supporters, is unsound. An unincorporated association has no identity separate and distinct from its membership. The organization rather than each of the members is denominated as party plaintiff for reasons of procedural convenience only and under the authority of Rule 17(b)(1) of the Federal Rules of Civil Procedure. The status of the organization for procedural purposes does not alter the substantive

law that an unincorporated association is the aggregate of its membership; the association has no rights beyond or different from those of its constituents. New York General Associations Law, Section 12. The corollary is that the association has the same rights that its members possess. For this reason, this organization could sue in libel in its organizational name. *Kirkman, etc., v. Westchester Newspapers, Inc.*, 287 N. Y. 373; *Lubliner v. Reinlib*, 50 N. Y. Supp. 2d 786. Consequently, the rights here asserted are the rights of the various individual members and participants in the activities of the JAFRC. Since those members and participants could join in an action to eliminate restrictions upon their activities in violation of the Due Process Clause of the Fifth Amendment, it follows that the organization which may sue on their behalf may assert the same rights. *Alston v. School Board of City of Norfolk*, 112 F. 2d 992, 997.

CONCLUSION

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia to review its judgment.

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
Petitioner.

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CLERK

In the Supreme Court of the United States

October Term, 1949-1950

JOINT ANTI-FASHIST REFUGEE COMMITTEE, PETI-
TIONER

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 556

JOINT ANTI-FASCIST REFUGEE COMMITTEE, PETITIONER

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the District of Columbia dismissing the complaint was entered without opinion (R. 35). The opinion of the Court of Appeals for the District of Columbia Circuit (R. 36) is reported at 177 F. 2d 79.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1949 (R. 49). A petition for rehearing, filed August 26, 1949 (R. 50), was de-

nied on September 22, 1949 (R. 51). On December 12, 1949, by order of Mr. Chief Justice Vinson, the time for filing a petition for a writ of certiorari was extended to, and including, January 25, 1950 (R. 53). The petition for a writ of certiorari was filed on January 25, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner has any legal standing or right to challenge a designation, made by the Attorney General pursuant to instructions issued by the President under Executive Order 9835, that petitioner is a communist organization.

STATUTE AND EXECUTIVE ORDER INVOLVED

Section 9A of the Hatch Act, 53 Stat. 1148, 5 U. S. C., Supp. II, 118j, and Executive Order 9835, 12 F. R. 1935, are set forth in the Appendix, *infra*, pp. 17-29.

STATEMENT

On March 21, 1947, the President, "by virtue of the authority vested in [him] by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i),¹ and as President and Chief Executive of the United States," issued Executive Order 9835 (12 F. R. 1935) to establish standards and machinery for determining the loyalty of federal employees and applicants. The

¹ Now 5 U. S. C., Supp. II, 118j.

Executive Order provided for the investigation of all persons now employed by the Federal Government or applying for such employment, for the establishment of Loyalty Boards in each department or agency, and for the establishment of a Civil Service Commission Loyalty Review Board. The Department of Justice was directed to furnish the Loyalty Review Board with "the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." (Part III, Section 3). In turn, the Loyalty Review Board was directed to disseminate such information to all departments and agencies (Part III, Section 3a). *Infra*, pp. 24-25.

The standard prescribed by the Executive Order for the refusal of employment, or the removal from employment, on grounds relating to loyalty is that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." (Part V, Section 1). One of the activities and associations which "may" be considered in connection with the

determination that reasonable grounds exist for belief that a person is disloyal is membership in, affiliation with, or sympathetic association with any organization listed by the Attorney General (Part V, Section 2 f). *Infra*, pp. 26-27.

On November 24, 1947, the Attorney General addressed a letter to the Chairman of the Loyalty Review Board, listing organizations and groups determined by him to fall within the description of Part III, Section 3, of Executive Order 9835. 13 F. R. 1471. *Infra*, pp. 31-38.² Petitioner was included in this list. By letter dated December 4, 1947, the Chairman of the Loyalty Review Board transmitted a copy of the Attorney General's letter to the various departments and agencies, pursuant to Part III, Section 3a, of the Executive Order. 13 F. R. 1471. *Infra*, pp. 29-30. In September 1948, the Attorney General divided the listed organizations into the separate categories named in the Executive Order, and petitioner was designated as a communist organization. This, too, was transmitted by the Chairman of the Loyalty Re-

² The letter states (Appendix, *infra*, pp. 36-37):

After the issuance of Executive Order No. 9835 by the President, the Department compiled all available data with respect to the type of organization to be dealt with under that order. The investigative reports of the Federal Bureau of Investigation concerning such organizations were correlated. Memoranda on each such organization were prepared by attorneys of the Department. The list of organizations herein certified is based on their recommendations as reviewed by the Solicitor General, the Assistant Attorneys General, and the Assistant Solicitor General, and my subsequent careful study of the recommendations of all.

view Board. 13 F. R. 1635. See Appendix, *infra*, pp. 38-47.

Petitioner alleges that, as a result of this designation and publication by the Attorney General, its ability to carry out its charitable activities of collecting and disbursing funds for the benefit of anti-fascist refugees who fought against the Franco Government in Spain has been irreparably damaged. (R. 4-5.) The injuries alleged are these: (a) the Bureau of Internal Revenue has deprived petitioner of its status as a tax exempt organization; (b) petitioner has been refused licenses required of organizations soliciting funds; (c) many former contributors, including present and prospective federal employees, have reduced or discontinued contributions; (d) many potential contributors, including present and prospective federal employees, have declined to make contributions; (e) petitioner has encountered increased difficulty in renting space to conduct activities, and reservations of facilities have been cancelled; (f) prominent speakers and entertainers refuse to participate in petitioner's activities; (g) and members and other participants have been subjected to public shame and ridicule, thereby discouraging further participation (R. 7-8).

This action was brought on February 10, 1948, to enjoin respondents, the Attorney General and the Chairman and members of the Loyalty Review Board of the Civil Service Commission, from designating and publicizing the name of petitioner as a

communist organization, to direct respondents to remove petitioner's name from the list of designated communist organizations, to make a public statement of this removal, and to take no action based on the inclusion of petitioner's name in the list of designated communist organizations. Petitioner further prayed for a declaratory judgment that Executive Order 9835, and Section 9A of the Hatch Act, as applied by the Executive Order, are unconstitutional because repugnant to the First, Fifth, Ninth, and Tenth Amendments (R. 8, 10). Simultaneously, petitioner moved to convene a three-judge court pursuant to 28 U. S. C. 380a, and for a preliminary injunction (R. 10, 11).

Respondents, in turn, moved to dismiss the complaint for want of a justiciable controversy between the parties and for failure to state a claim upon which relief can be granted (R. 34). Following a hearing, the District Court, on June 4, 1948 dismissed the complaint and denied the motion for a preliminary injunction (R. 35). The Court of Appeals, one judge dissenting, affirmed (R. 49).

ARGUMENT

In this action, petitioner seeks to attack the constitutionality of the Federal government's loyalty program. Although, in our opinion, the constitutionality of the loyalty program is clear (see *United Public Workers v. Mitchell*, 330 U. S. 75), it is unnecessary to determine that problem here; the constitutional question is not present in the instant

case for want of a justiciable controversy and of any legal standing in petitioner to challenge the actions it condemns. The fact that it would be convenient for the parties to have the validity of the loyalty program promptly adjudicated cannot create jurisdiction where none exists. "The courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question 'only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.'" *Alabama Power Co. v. Ickes*, 302 U. S. 464, 479; *Federation of Labor v. McAdory*, 325 U. S. 450, 463.³ "The obstacle is not procedural. It inheres in the substantive law, in the well settled rules of equity, and in the practice in cases involving the constitutionality of legislation." Brandeis, J. concurring in

³ That the Federal Declaratory Judgment Act does not enlarge the basic jurisdiction of the Court and does not create controversies where none existed before has been affirmed many times by this Court. *E.g.*, *Colegrove v. Green*, 328 U. S. 549, 551-552; *Coffman v. Breeze Corps.*, 323 U. S. 316, 324; *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240; *United States v. West Virginia*, 295 U. S. 463, 475; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 262.

In this connection, it should be pointed out that the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.* also offers no support to petitioner. Section 10(a) thereof, partially quoted by petitioner (Pet. 60), provides that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U. S. C. 1009(a). Since there is no relevant statute herein defining "adversely affected or aggrieved," it is plain that the test of justiciability remains the same, i.e., that there be a legal wrong.

Ashwander v. Tennessee Valley Authority, 297 U. S. 288 at 341.⁴

1. The legal incidence of a challenged administrative finding, comparable to that presented here, which this Court found not to involve any justiciable legal rights was pertinently described in *United States v. Los Angeles & St. L. R. Co.*, 273 U. S. 299, 309-310: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." And see *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. 103, 113; *Federal Power Comm'n v. Hope Gas Co.*, 320 U. S. 591, 619; *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 130-131; *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527; *Ex parte Williams*, 277 U. S. 267, 271; *Penna. Federation v. P. R. R. Co.*, 267 U. S. 203, 215; *Penna R. R. v. Labor Board*, 261 U. S. 72, 85; *Standard Scale Co. v. Farrell*, 249 U. S. 571, 574; *Employers Group*,

⁴ It is also pertinent to observe that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." Frankfurter, J. concurring, in *United States v. Lovett*, 328 U. S. 303, 318 at 320.

Etc. v. National War Labor Board, 143 F. 2d 145, 147 (C. A. D. C.), certiorari denied, 323 U. S. 735; *National War Labor Board v. Montgomery Ward & Co.*, 144 F. 2d 528 (C. A. D. C.), certiorari denied, 323 U. S. 774; *National War Labor Board v. United States Gypsum Co.*, 145 F. 2d 97 (C. A. D. C.), certiorari denied, 324 U. S. 856, rehearing denied, 324 U. S. 890.

This analysis squarely applies to the action of respondents, pursuant to Executive Order 9835, in making public the challenged designation of petitioner as communist. Neither the Hatch Act, the Executive Order, nor the Attorney General's list contains any regulation or directive limiting the operation or conduct of petitioner's affairs. Petitioner remains perfectly free to collect and disburse funds in the same manner as it has always done. It is free to conduct meetings and other functions, to express itself freely through its officers and members. It is not prevented from uttering, or publishing and distributing its beliefs. Cf. *Martin v. Struthers*, 319 U. S. 141. Neither the statute, the Executive Order, nor the Attorney General's list requires the resignation of petitioner's members nor do they bar the entry of new members. They contain no directive to other federal, state or municipal officials which in any way subjects petitioner to the contingency of future administrative action. They subject neither petitioner nor its members to any criminal or civil

penalties, either immediate or postponed. Cf. *Shields v. Utah Idaho R. Co.*, 305 U. S. 177. In short, in no way is petitioner's own existing or future legal status changed. Cf. *Rochester Tel. Corp. v. United States*, 307 U. S. 125; *La Crosse Tel. Corp. v. Wis. Employment Relations Board*, 336 U. S. 18, 24. It therefore has no standing to contest the action taken by respondents.

2. Examination of the specific injuries alleged demonstrates that the requisites of justiciability are entirely missing. To recapitulate, the injuries alleged are that, because of the publication by respondents, (a) the Bureau of Internal Revenue has deprived petitioner of its status as a tax exempt organization; (b) petitioner has been refused licenses required of organizations soliciting funds; (c) many former contributors, including federal employees, have reduced or discontinued contributions; (d) many potential contributors, including federal employees, have declined to make contributions; (e) petitioner has encountered increased difficulty in renting space to conduct activities, and reservations of facilities have been cancelled; (f) prominent speakers and entertainers refuse to participate in petitioner's activities; and (g) members and other participants have been subjected to public shame and ridicule, thereby discouraging further participation. (R. 7-8).

In considering these allegations, it must be again emphasized that petitioner's legal status is un-

altered by the Hatch Act, the Executive Order, and the Attorney General's list. So considered, it is clear that petitioner's first allegation of damage has no basis in fact. The tax status of petitioner is determined solely by Section 101(6) of the Internal Revenue Code, 26 U. S. C. 101(6), which grants an exemption to charitable corporations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." If petitioner were previously entitled to an exemption, it is still so entitled. Petitioner's quarrel is with the Commissioner of Internal Revenue, not with respondents who exercise no functions under the Internal Revenue Code in this connection; its remedy lies in a proceeding against the Commissioner in a proper case under the Code, not against respondents. So far as the record shows, petitioner has not seen fit to avail itself of the legal remedy thus afforded.

For the same reason, petitioner's allegation that it has been refused licenses to solicit funds is also defective. The grant of such licenses by States or municipalities depends upon the laws or ordinances of those polities. In no way does the statute, Executive Order, or the Attorney General's list purport to define petitioner's status under those laws or ordinances. It is apparent that petitioner is now entitled to such licenses to the same extent that it was prior to its designation as communist since neither its organization, its purposes nor its

operations has changed. Again, petitioner's quarrel is with those local officials, not respondents and it is not shown that petitioner has taken any legal action to vindicate its reputation or its rights.

The remaining allegations of damage amount to no more than that respondents have, by defamation, adversely affected petitioner's advantageous relationships with others. But this defamation, if it be such,⁵ has no legally operative effect upon such relationships. The injuries of which petitioner complains largely arise from the force of public opinion and not from the direct action of respondents. In the first place, the statute, the Executive Order, and the Attorney General's list are intended solely to secure the employment in the Federal Government of those loyal to our constitutional form of government.⁶ Neither on their face, nor in their operation, do they purport to control petitioner's relationships with any other persons or to impose any legal consequence upon such relationships.

The designation of petitioner as communist has no mandatory effect even upon federal employees.⁷

⁵ Neither the complaint, the briefs below, nor the petition denies the correctness of the Attorney General's designation of petitioner as communist.

⁶ The determination of the fitness of a government employee is an executive function, normally immune from judicial supervision. *Keim v. United States*, 177 U. S. 290, 292, 293; *Friedman v. Schwellenbach*, 159 F. 2d 22 (C.A.D.C.), certiorari denied, 330 U. S. 838.

⁷ It should be noted that no federal employees are parties to this proceeding. Nor is it alleged that any federal em-

The Attorney General's list merely furnishes information to the various federal agencies. The standard for denying federal employment is that "on *all* the evidence reasonable grounds exist for belief that the person involved is disloyal to the United States." The letters of the Attorney General and the Chairman of the Loyalty Review Board specifically state that membership in, affiliation with, or sympathetic association with, a designated organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. (Appendix, *infra*, pp. 30, 37.) Accordingly, federal employees are not unconditionally barred from participation in petitioner's activities, and their membership is only one factor to be considered. We do not have, therefore, the direct and near-automatic disruption of important business relationships which in other cases has led the Court—in order to prevent the complete destruction of major economic or business interests by invalid regulation—to consider challenges to governmental

ployee who participated in petitioner's activities has been specifically threatened with dismissal from federal employment because of such participation. As to such federal employees, no justiciable controversy could arise until an imminent threat of their discharge from federal employment arose. Cf. *United Public Workers v. Mitchell*, 330 U. S. 75, 86-91. It seems clear that petitioner can have no greater standing to sue in this respect than its individual members. The complaint herein not only fails to allege any specific threat of discharge to its members who are government employees but it does not even allege that it is appearing for and on behalf of such members to protect them against discharge.

action on the part of persons against whom that action was not directed.⁸ Cf. *Truax v. Raich*, 239 U. S. 33; *Pierce v. Society of Sisters*, 268 U. S. 510; *Columbia Broadcasting System v. United States*, 316 U. S. 407, 417, 419.

3. The gravamen of the complaint thus resolves itself to the alleged damage to "the favorable reputation, moral support, and good will of the American people enjoyed by plaintiff" (R. 5). But it is well settled that public officials are *absolutely* privileged to publish even false and defamatory matter in the exercise of official duties. *Spalding v. Vilas*, 161 U. S. 483; *Gregoire v. Biddle*, 177 F. 2d 579 (C. A. 2); *Laughlin v. Rosenman*, 163 F. 2d 838 (C. A. D. C.); *Jones v. Kennedy*, 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Glass v. Ickes*, 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Cooper v. O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; *Mellon v. Brewer*, 18 F. 2d 168 (C. A. D. C.), certiorari denied, 275 U. S. 530. See American Law Institute, *Restatement of Torts*, §§ 558, 591. And it is plain that this alleged defamation was an official communication as to matters within the authority of respondents.⁹ Petitioner's contention that there

⁸ The complaint contains no allegation as to the number or proportion of petitioner's membership which consists of federal employees, or of the extent of the claimed injury attributable to the alleged dropping out of federal employees.

⁹ It is to be noted that there is no allegation of malice or personal ill-will.

is no privilege if the authority pursuant to which respondents acted is unconstitutional overlooks the important principles of public policy upon which the privilege is grounded, as well as the uniform history of the doctrine. "The public interest requires that persons occupying such important positions * * * should speak and act freely and fearlessly in the discharge of their important official functions" (*Yaselli v. Goff*, 12 F. 2d 396, 406 (C. A. 2), affirmed, 275 U. S. 503, repeated in *Gregoire v. Biddle*, *supra*, at 580), and their privilege does not depend upon the ultimate outcome of a judicial determination of the validity of the particular authority under which they act or speak.

Nor is this privilege limited to actions for money damages, as petitioner asserts (Pet. 74). The privilege is an absolute one, and the complainant has no cause of action or claim of infringed right to assert. It is as important to the full and fearless exercise of public functions to free high government officials from the necessity of defending their public statements in equity suits as in damage actions. The foundation of the doctrine of privilege is that, on the whole, the public interest in just, efficient, and responsive government is better served by leaving the correction of unfair or defamatory public statements to the countermeasures of publicity than by the threat of judicial trials of their truth or fairness.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
BENJAMIN FORMAN,
Attorneys.

FEBRUARY 1950.

APPENDIX

1. Section 9A of the Hatch Act, Act of August 2, 1939, c. 410, 53 Stat. 1147, 1148, 5 U. S. C., Supp. II, 118j:

(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

2. EXECUTIVE ORDER 9835

PREScribing PROCEDURES FOR THE ADMINISTRATION
OF AN EMPLOYEES LOYALTY PROGRAM IN THE
EXECUTIVE BRANCH OF THE GOVERNMENT

Whereas each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

Whereas it is of vital importance that person employed in the Federal service be of complete and unswerving loyalty to the United States; and

Whereas, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

Now, Therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I.—INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

- a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.

- b.* Civil Service Commission files.
- c.* Military and naval intelligence files.
- d.* The files of any other appropriate government investigative or intelligence agency.
- e.* House Committee on un-American Activities files.
- f.* Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
- g.* Schools and colleges attended by applicant.
- h.* Former employers of applicant.
- i.* References given by applicant.
- j.* Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II. INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees

are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of

the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may

suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary, to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name

of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them,

and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

PART V—STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI.—MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either di-

rectly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN,

THE WHITE HOUSE,
MARCH 21, 1947.

3. UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C., December 4, 1947.

SIR: Part III of Executive Order No. 9835 prescribing procedures for the administration of an employee loyalty program in the Executive Branch of the Government requires the Department of Justice to furnish this Board with—

the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as Totalitarian, Fas-

cist, Communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

In performance of said requirement, the Department of Justice has furnished to this Board a letter from the Attorney General containing the names so designated by him.

Part III of said Executive Order also requires this Board "to disseminate such information to all Departments and Agencies." A copy of said letter from the Attorney General is accordingly enclosed herewith and a copy is also being sent to each other Department and Agency of the Government. This Board is preparing and will shortly forward to you Rules, Regulations and Standards by which you are to be guided.

The President in addressing this Board said, with reference to the names to be furnish by the Department of Justice:

Membership in an organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case.

In using the names set forth in said letter, you should have in mind these sentiments to which this Board subscribes.

SETH W. RICHARDSON,
Chairman, Loyalty Review Board.

Enclosure.

4. OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., November 24, 1947.

Honorable SETH W. RICHARDSON,
Chairman, Loyalty Review Board,
Civil Service Commission, Washington, D. C.

MY DEAR MR. RICHARDSON: This is submitted pursuant to the President's Executive Order No. 9835 in which he stated that it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States, and further stated that although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes. The order provided in Part III, section 3, as follows:

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

Under a previous Executive order (No. 9300), issued February 5, 1943, entitled "Establishing the Interdepartmental Committee to Consider Cases of Subversive Activity on the Part of Federal Employees," and under other relevant authority, the Department of Justice named a number of organizations as subversive. That list was disseminated among the Government agencies for use in connection with consideration of employee loyalty, and included the following organizations:

American League Against War and Fascism.

American Patriots, Inc.

American Peace Mobilization.

American Youth Congress.

Association of German Nationals (Reichs-deutsche Vereinigung).

Black Dragon Society.

Central Japanese Association (Beikoku Chuo Nipponjin Kai).

Central Japanese Association of Southern California.

Central Organization of the German-American National Alliance (Deutsche-Amerikanische Einheitsfront).

Communist Party of U. S. A.

Congress of American Revolutionary Writers.

Dai Nippon Butoku Kai (Military Virtue Society of Japan or Military Art Society of Japan).

Dante Alighieri Society.

Federation of Italian War Veterans in the U. S. A., Inc. (Associazione Nazionale Combattenti Italiani, Federazione degli Stati Uniti d'America).

Friends of the New Germany (Freunde des Neuen Deutschlands).

German-American Bund (Amerikadeutscher Volksbund).

German-American Vocational League (Deutsche-Amerikanische Berufsgemeinschaft).

Heimuska Kai, also known as Nokubei Heieki Gimusha Kai, Zaibel Nihonjin, Heiyaku Gimusha Kai, and Zaibel Heimusha Kai (Japanese Residing in America Military Conscripts Association).

Hinode Kai (Imperial Japanese Reservists).

Hinomaru Kai (Rising Sun Flag Society—a group of Japanese War Veterans).

Hokubei Zaigo Shoke Dan (North American Reserve Officers Association).

Japanese Association of America.

Japanese Overseas Central Society (Kaigai Dobo Chuo Kai).

Japanese Overseas Convention, Tokyo, Japan, 1940.

Japanese Protective Association (Recruiting Organization).

Jikyoku lin Kai (Current Affairs Association).

Kibei Seinen Kai (Association of U. S. Citizens of Japanese Ancestry who have returned to America after studying in Japan).

Kyffhaeuser, also known as Kyffhaeuser League (Kyffhaeuser Bund), Kyffhaeuser Fellowship (Kyffhaeuser Kameradschaft).

Kyffhaeuser War Relief (Kyffhaeuser Kriegshilfswerk).

Lictor Society (Italian Black Shirts).

Mario Morgantini Circle.

Michigan Federation for Constitutional Liberties.

Namka Teikoku Gunyūdan (Imperial Military Friends Group or Southern California War Veterans).

National Committee for the Defense of Political Prisoners.

National Federation for Constitutional Liberties.

National Negro Congress.

Nichibei Kogyo Kaisha (The Great Fujii Theatre).

Northwest Japanese Association.

Protestant War Veterans of the U. S., Inc.

Sakura Kai (Patriotic Society, or Cherry Association—composed of veterans of Russo-Japanese War).

Shinto Temples.

Silver Shirt Legion of America.

Sokoku Kai (Fatherland Society).

Suiko Sha (Reserve Officers Association, Los Angeles).

Washington Book Shop Association.

Washington Committee for Democratic Action.

Workers Alliance.

Under Part III, section 3, of Executive Order No. 9835, the following additional organizations are hereby designated:

American Polish Labor Council.

American Youth for Democracy.

Armenian Progressive League of America.

Civil Rights Congress and its affiliated organizations, including: Civil Rights Congress for

Texas; Veterans Against Discrimination of Civil Rights Congress of New York.

The Columbians.

Communist Party, U. S. A., formerly Communist Political Association, and its affiliates and committees, including: Citizens Committee of the Upper West Side (New York City); Committee to Aid the Fighting South; Dennis Defense Committee; Labor Research Association, Inc.; Southern Negro Youth Congress; United May Day Committee; United Negro and Allied Veterans of America.

Connecticut State Youth Conference.

Council on African Affairs.

Hollywood Writers Mobilization for Defense.

Hungarian-American Council for Democracy.

International Workers Order, including People's Radio Foundation, Inc.

Joint Anti-Fascist Refugee Committee.

Ku Klux Klan.

Macedonian-American People's League.

National Committee to Win the Peace.

National Council of American-Soviet Friendship.

Nature Friends of America (since 1935).

New Committee for Publications.

Photo League (New York City).

Proletarian Party of America.

Revolutionary Workers League.

Socialist Workers Party, including American

Committee for European Workers' Relief.

Veterans of the Abraham Lincoln Brigade.

Workers Party, including Socialist Youth League.

Your attention is also directed to certain organizations which are operated as schools. While, of course, I am not of the view that any institution of learning, devoted to the advancement of knowledge, is subversive, it appears that these organizations are adjuncts of the Communist Party. They are as follows:

Abraham Lincoln School, Chicago, Illinois.

George Washington Carver School, New York City.

Jefferson School of Social Science, New York City.

Ohio School of Social Sciences.

Philadelphia School of Social Science and Art.

Samuel Adams School, Boston, Massachusetts.

School of Jewish Studies, New York City.

Seattle Labor School, Seattle, Washington.

Tom Paine School of Social Science, Philadelphia, Pennsylvania

Tom Paine School of Westchester, New York.

Walt Whitman School of Social Science, Newark, New Jersey.

After the issuance of Executive Order No. 9835 by the President, the Department compiled all available data with respect to the type of organization to be dealt with under that order. The investigative reports of the Federal Bureau of Investigation concerning such organizations were correlated. Memoranda on each such organization were prepared by attorneys of the Department. The list of organizations herein certified is based on their recommendations as reviewed by the Solicitor General, the Assistant Attorneys General, and the Assistant

Solicitor General, and my subsequent careful study of the recommendations of all.

In connection with the designation of these organizations I wish to reiterate, as the President has pointed out, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with or sympathetic association with, any organization designated, is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. "Guilt by association" has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide.

The organizations named in this letter do not represent a complete or final compilation. For example, a number of small and local organizations are not listed. As to many organizations not named, the presently available information is insufficient to warrant a final determination as to their character. Others, presently innocuous, may become the victims of dangerous infiltrating forces and, as a consequence, become proper subjects for designation. New organizations may come into existence whose purposes and activities are in conflict with loyalty to the United States.

From time to time, therefore, as contemplated and directed by the Executive order, there will be furnished to the Board the names of those additional organizations and groups as to which the information received by this Department, resulting from continued investigation, indicates similar designations are required.

If I can be of further assistance to you in reference to the subject matter of this letter, please let me know.

Sincerely yours,

TOM C. CLARK,
Attorney General.

5. UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C., September 21, 1948.

Memorandum No. 19

To All Executive Departments and Agencies.

Subject: Classification according to Section 3, Part III, of E. O. 9835 of Organizations Previously Designated by the Attorney General as within the purview of the Executive Order.

The Attorney General has furnished the Loyalty Review Board with information classifying the organizations which he has listed within the Executive Order under the following categories: (1) Totalitarian; (2) Fascist; (3) Communist; (4) Subversive; (5) Organizations which have "adopted a policy of advocating or approving the commission of acts of force and violence to deny others their rights under the Constitution of the United States"; and (6) Organizations which "seek to alter the form of government of the United States by unconstitutional means."

Enclosed for your information and guidance is a copy of the consolidated list prepared by the Attorney General of organizations previously designated as within Executive Order 9835 by the Attorney General's letters of November 24, 1947, and May 27, 1948 (clarified on August 4, 1948), according to the

classifications of Section 3, Part III, of the Executive Order.

SETH W. RICHARDSON,
Chairman, Loyalty Review Board.

CONSOLIDATED LIST OF ORGANIZATIONS PREVIOUSLY
DESIGNATED AS WITHIN EXECUTIVE ORDER NO.
9835 BY LETTERS OF NOVEMBER 24, 1947, AND MAY
27, 1948, ACCORDING TO THE CLASSIFICATIONS OF
SECTION 3, PART III OF THE EXECUTIVE ORDER

Totalitarian:

Black Dragon Society.

Central Japanese Association (Beikoku Chuo
Nipponjin Kai).

Central Japanese Association of Southern
California.

Dai Nippon Butoku Kai (Military Virtue So-
ciety of Japan or Military Art Society of
Japan).

Heimusha Kai, also known as Nokubei Heieki
Gimusha Kai, Zaibel Nihonjin, Heiyaku
Gimusha Kai, and Zaibei Heimusha Kai
(Japanese Residing in America Military
Conscripts Association).

Hinode Kai (Imperial Japanese Reservists).

Hinomaru Kai (Rising Sun Flag Society—a
group of Japanese War Veterans).

Hokubei Zaigo Shoke Dan (North American
Reserve Officers Association).

Japanese Association of America.

Japanese Overseas Central Society (Kaigai
Dobo Chuo Kai).

Japanese Overseas Convention, Tokyo, Japan, 1940.

Japanese Protective Association (Recruiting Organization).

Jikyoku lin Kai (Current Affairs Association).

Kibei Seinen Kai (Association of U. S. Citizens of Japanese Ancestry who have returned to America after studying in Japan).

Nanka Teikoku Gunyudan (Imperial Military Friends Group or Southern California War Veterans).

Nichibei Kogyo Kaisha (The Great Fujii Theatre).

Northwest Japanese Association.

Peace Movement of Ethiopia.

Sakura Kai (Patriotic Society, or Cherry Association—composed of veterans of Russo-Japanese War).

Shinto Temples.

Sokoku Kai (Fatherland Society).

Suiko Sha (Reserve Officers Association Los Angeles).

Fascist:

American Patriots, Inc.

Ausland-Organization der NSDAP, Overseas Branch of Nazi Party.

Association of German Nationals (Reichs-deutsche Vereinigung).

Central Organization of the German-American National Alliance (Deutsche-Amerikanische Einheitsfront).

Citizens Protective League.

Dante Alighieri Society.

Federation of Italian War Veterans in the U. S. A., Inc. (Associazione Nazionale Combattenti Italiani, Federazione degli Stati Uniti d' America).

Friends of the New Germany (Freunde des Neuen Deutschlands).

German-American Bund (Amerikadeutscher Volksbund).

German-American Republican League.

German-American Vocational League (Deutsche-Amerikanische Berufsgemeinschaft).

Kyffhaeuser, also known as Kyffhaeuser League (Kyffhaeuser Bund), Kyffhaeuser Fellowship (Kyffhaeuser Kameradschaft).

Kyffhaeuser War Relief (Kyffhaeuser Kriegshilfswerk).

Lictor Society (Italian Black Shirts).

Mario Morgantini Circle.

Communist:

Abraham Lincoln School, Chicago, Illinois.

American League Against War and Fascism.

American Association for Reconstruction in Yugoslavia, Inc.

American Committee for European Workers' Relief.

American Committee for Protection of Foreign Born.

American Committee for Yugoslav Relief, Inc.

American Council for a Democratic Greece.

American Council on Soviet Relations.

American Croatian Congress.

American League for Peace and Democracy.

American Peace Mobilization.

- American Polish Labor Council.
- American Russian Institute (of San Francisco).
- American Slav Congress.
- American Youth Congress.
- American Youth for Democracy.
- Armenian Progressive League of America.
- California Labor School, Inc., 216 Market Street, San Francisco, California.
- Central Council of American Women of Croatian Descent, aka Central Council of American Croatian Women, National Council of Croatian Women.
- Citizens Committee of the Upper West Side (New York City).
- Civil Rights Congress and its affiliates.
- Committee to Aid the Fighting South.
- Communist Party, U. S. A.
- Communist Political Association.
- Connecticut State Youth Conference.
- Congress of American Revolutionary Writers.
- Congress of American Women.
- Council on African Affairs.
- Council for Pan-American Democracy.
- Dennis Defense Committee.
- Friends of the Soviet Union.
- George Washington Carver School, New York City.
- Hollywood Writers Mobilization for Defense.
- Hungarian-American Council for Democracy.
- International Labor Defense.
- International Workers Order, including People's Radio Foundation, Inc.
- Jefferson School of Social Science, New York City.

Jewish Peoples Committee.
 Joint Anti-Fascist Refugee Committee.
 Labor Research Association, Inc.
 League of American Writers.
 Macedonian-American People's League.
 Michigan Civil Rights Federation.
 National Committee for the Defense of Political Prisoners.
 National Committee to Win the Peace.
 National Council of Americans of Croatian Descent.
 National Council of American-Soviet Friendship.
 National Federation for Constitutional Liberties.
 National Negro Congress.
 Nature Friends of America (since 1935).
 Negro Labor Victory Committee.
 New Committee for Publications.
 Ohio School of Social Sciences.
 People's Educational Association.
 People's Institute of Applied Religion.
 People's Radio Foundation, Inc.
 Philadelphia School of Social Science and Art.
 Photo League (New York City).
 Proletarian Party of America.
 Revolutionary Workers League.
 Samuel Adams School, Boston, Massachusetts.
 School of Jewish Studies, New York City.
 Seattle Labor School, Seattle, Washington.
 Serbian Vidovdan Council.
 Slovenian-American National Council.
 Socialist Workers Party, including American Committee for European Workers' Relief.
 Socialist Youth League.

Southern Negro Youth Congress.

Tom Paine School of Social Science, Philadelphia, Pennsylvania.

Tom Paine School of Westchester, New York.

United Committee of South Slavic Americans.

United Harlem Tenants and Consumers Organization.

United May Day Committee.

United Negro and Allied Veterans of America.

Veterans of the Abraham Lincoln Brigade.

Walt Whitman School of Social Science, Newark, New Jersey.

Washington Bookshop Association.

Washington Committee for Democratic Action.

Wisconsin Conference on Social Legislation.

Workers Alliance.

Workers Party, including Socialist Youth League.

Young Communist League.

Subversive:

Communist Party, U. S. A.

Communist Political Association.

German-American Bund.

Socialist Workers Party.

Workers Party.

Young Communist League.

Organizations which have "adopted a policy of advocating or approving the commission of acts of force and violence to deny others their rights under the Constitution of the United States":

Columbians.

Ku Klux Klan.

Protestant War Veterans of the United States.
Silver Shirt Legion of America.

Organizations which "seek to alter the form of government of the United States by unconstitutional means":

Communist Party, U. S. A.

Communist Political Association.

Socialist Workers Party.

Workers Party.

Young Communist League.

6. OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., August 5, 1948.

HON. SETH W. RICHARDSON,
*Chairman, Loyalty Review Board,
United States Civil Service Commission,
Washington 25, D. C.*

MY DEAR MR. RICHARDSON: This is in further reference to your letters of May 28, 1948, and July 28, 1948, wherein you request particularization with respect to the classification under Section 3, Part III, of Executive Order 9835 of the various organizations designated by me pursuant thereto in my respective letters to you as Chairman of the Loyalty Review Board, dated November 24, 1947, and May 27, 1948. I refer also to our informal discussion on the subject.

Section 3, Part III, of Executive Order 9835, as you have pointed out, sets forth six classifications of organizations within its contemplation. The language of Part V, Section 2f, is substantially identical. Applying the elementary rule of statutory construction, each of these classifications must be taken to be independent and mutually exclusive

of the others. It may well be that a designated organization, by reason of origin, leadership, control, purposes, policies, or activities, alone or in combination, may fall within more than one of the specified classifications. In such cases a reasonable interpretation of the Executive Order would seem to require that designation be predicated upon its dominant characteristics rather than extended to include all other classifications possible on the basis of what may be subordinate attributes of the group. In classifying the designated organizations I have been guided by this policy. Accordingly, it should not be assumed that an organization's dominant characteristic is its only characteristic.

Attached hereto you will find a consolidated list containing the names of all of the organizations previously designated by me as within Executive Order 9835, segregated according to the classifications enumerated in Section 3, Part III, on the basis of dominant characteristics.

In your letter you indicate you have concluded that the fifth category of Section 3, Part III, i. e., organizations which have "adopted a policy of advocating or approving the commission of acts of force and violence to deny others their rights under the Constitution of the United States," is not based upon a question of loyalty and therefore would not come within the purview of the jurisdiction of the Board. I regret I cannot concur in this view. It is implicit within Executive Order 9835 that the criteria enumerated do involve aspects of loyalty which your Board, as well as the departments and agencies concerned, is required to consider in the execution of the duties imposed thereby.

It is not open to the Board nor to any of the executive departments or agencies to disregard any of these criteria. The oath of office taken by every person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States, as prescribed by the Act of May 13, 1884 (Sec. 16, Title 5, United States Code) includes the following language:

I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same * * *

It is difficult to reconcile informed membership or activity in any organization designated "as having adopted a policy of advocating or approving a commission of acts of force or violence to deny others their rights under the Constitution of the United States" as consistent with loyalty to the Government of the United States or fulfillment of the oath of office taken by each employee of its executive departments and agencies.

I trust that this amplification of the designations previously made by me will serve to remove some of the difficulties which you state you have experienced. If I can be of any further assistance in this regard please do not hesitate to call upon me.

Sincerely,

(S) TOM C. CLARK,
Attorney General

Enclosure No. 437091.

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IN THE
Supreme Court of the United States

OCTOBER TERM—1950

No. 8

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
an unincorporated association,

Petitioner,

v.

J. HOWARD McGRATH, Attorney General
of the United States, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

O. JOHN ROGGE,
BENEDICT WOLF,
Attorneys for Petitioner.

MURRAY A. GORDON,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM—1950

No. 8

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
an unincorporated association,

Petitioner,

v.

J. HOWARD McGRATH, Attorney General
of the United States, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The majority and dissenting opinions in the Court of Appeals for the District of Columbia Circuit are reported at 177 F. 2d 79 (R.* 36-48).

Jurisdiction

The judgment of the Court of Appeals, affirming the order of the District Court for the District of Columbia which dismissed the complaint on motion for legal insufficiency and denied petitioner's motion for a preliminary in-

* Page references in the transcript of record are hereinafter cited as "R".

junction, was made and filed August 11, 1949 (R. 49). A petition for rehearing addressed to the said Court of Appeals was denied by order dated and filed September 22, 1949 (R. 50-51). On motion of the petitioner herein an order was made by Mr. Chief Justice Vinson on December 12, 1949 extending the time for petitioner to petition for writ of certiorari to and including January 25, 1950 (R. 53). The petition was filed on January 25, 1950 and certiorari was granted on March 13, 1950 (R. 54) (339 U. S. 910).

The jurisdiction of this Court is conferred by Section 1254(1) of Title 28 of the United States Code.

Statutes and Orders Involved

1. Section 9A of the Hatch Act (Act of August 2, 1939, c. 410, § 9A, 53 Stat. 1148, 5 U. S. C. A. § 118j):

“(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.”

2. The pertinent provisions of Executive Order 9835 (12 FR 1935, 3 CFR (1947 Supp.) Ch. II, 129):

(a) Preamble.

“Now, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes of the United States, including the Civil Service Act of

1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows":

(b) Part III, Section 3.

"The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies."

(c) Part V.

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to

alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Statement

The instant action was brought for declaratory and injunctive relief by the Joint Anti-Fascist Refugee Committee (hereinafter referred to as "JAFRC"), an unincorporated association, located in New York City, N. Y., against Tom C. Clark, the then Attorney General of the United States,* Seth W. Richardson, Chairman of the Loyalty Review Board of the Civil Service Commission, and the other members of that Board. Respondents were named in their capacity as individuals. Petitioner sought to

* By an order of the Court of Appeals for the District of Columbia Circuit dated and filed October 14, 1949, J. Howard McGRATH, Attorney General of the United States, was substituted as a party-appellee herein in the place and stead of appellee Tom C. Clark (R. 50).

remedy and enjoin certain action of respondents taken pursuant to Executive Order 9835, the so-called "Loyalty Order," which the petitioner declares to be unconstitutional.

The first cause of action alleges that the JAFRC has conducted relief activities, under governmental supervision (R. 2), since its inception in 1942 for the benefit of anti-fascist refugees who had fought with and assisted the duly constituted government of Spain in its opposition to the efforts of Francisco Franco to overthrow that government by armed force (R. 3). The JAFRC assisted in the release of such refugees from concentration camps and arranged for their transportation, asylum and other aid; and at the present time the JAFRC is principally devoted to aiding such anti-fascist refugees by supplying them with money, food, clothing, and medical assistance (R. 3, 11-21). A total of \$1,011,448.00 in cash and \$217,903.00 in kind was disbursed by the JAFRC from 1942 through 1947 for relief (R. 3). The funds for these relief activities were raised at social affairs, rallies, meetings, dinners, theatre parties, etc., conducted by the JAFRC, so that petitioner's ability to carry on its relief work is based upon the good will of the American people which it has enjoyed (R. 3).

The petitioner's work has been and will continue to be seriously and irreparably damaged by actions of the respondents purportedly performed pursuant to Executive Order 9835 (R. 4). That Order was issued on March 25, 1947 and recited that it was based upon the President's constitutional powers and upon powers delegated by the Congress (R. 4). The stated purpose of Executive Order 9835 was to establish standards and machinery for determining the loyalty of federal civil service employees and applicants (R. 4). It provided for the establishment of the Civil Service Commission Loyalty Review Board which was to be furnished by the Department of Justice with, and was to disseminate to all departments and agencies,

the name of each foreign or domestic organization, association, movement, group, or combination of persons which the Attorney General, after "appropriate investigation and determination," designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States or . s seeking to alter the form of government of the United States by unconstitutional means" (R. 5). Membership in, affiliation with, "or sympathetic association with any" such designated "organization, association, movement, group or combination of persons" could, under the Order, "be considered in connection with the determination of disloyalty" (R. 4-5).

On November 24, 1947, in a letter to the respondent, Seth W. Richardson, the then Attorney General Tom C. Clark listed the petitioner, among 90 others, as an organization, membership in, affiliation or sympathetic association with which could be the basis for a finding that an applicant or employee is "disloyal"; petitioner never received any notice or hearing concerning such designation (R. 5), and on December 4, 1947, the respondent Richardson released that letter to be publicized (R. 6).

The publication of that letter caused petitioner serious injury. As a direct result of the dissemination of the designation of the petitioner: the Bureau of Internal Revenue announced that it had revoked its ruling classifying the JAFRC as a tax-exempt organization (R. 6, 22); contributors, especially present and prospective civil servants, reduced or discontinued their contributions to the petitioner (R. 6, 22-27); licenses required for the solicitation of funds were refused the JAFRC (R. 6); meeting places and facilities necessary for the conduct of the JAFRC fund-raising activities were denied to the petitioner (R. 6, 25-27); and the taint placed by the respondents upon the JAFRC lost the organization the support of speakers,

entertainers, members and other participants (R. 6, 24). In response to a letter sent by Helen R. Bryan (R. 22), the JAFRC Executive Secretary, the various local chapters in Chicago (R. 22), Seattle (R. 22-23), San Francisco (R. 23), Philadelphia (R. 23) and Boston (R. 24-25) have indicated that the injurious effect of the Attorney General's appellation of the JAFRC as "subversive" has been nationwide.

The complaint further alleges that the acts of the respondents were without warrant in law and deprived petitioner of its rights in violation of the Constitution (R. 7); and that Section 9A of the Hatch Act and Executive Order 9835 are repugnant to the First, Fifth, Ninth, and Tenth Amendments to the United States Constitution (R. 7).

Upon these allegations and upon the recitation of other appropriate jurisdictional requirements (R. 7-8), the first cause of action prays for a declaratory judgment (R. 8) and the second cause of action prays for injunctive relief (R. 8-9).

The prayer for relief requests: (1) a declaration that Executive Order 9835, and Section 9A as applied by Executive Order 9835, are unconstitutional; and (2) a permanent and temporary injunction:

(a) restraining the further dissemination by respondents of the name of petitioners as a designated organization;

(b) directing respondents to remove petitioner's name from the list of designated organizations and to make a public statement thereof;

(c) restraining respondents from taking any other action which may be based upon the inclusion of petitioner's name in the list of designated organizations (R. 8-9).

Simultaneously with the service of the complaint, petitioner moved for a three-judge court pursuant to 28 U. S. C. § 2282 and for a preliminary injunction (R. 2, 9-11). Respondents cross-moved to dismiss the complaint (R. 28). All the motions were argued before District Judge LETTS who, after denying the application for a three-judge court, proceeded directly to hear and consider the other motions. The motion to dismiss was granted and the injunction denied, without opinion, by order filed June 4, 1948 (R. 28-29). Thereafter an appeal to the United States Court of Appeals for the District of Columbia Circuit was duly instituted.

The appeal in the Court of Appeals was argued on March 16, 1949, and on August 11, 1949, the ruling of the District Court was affirmed, EDGERTON, J., dissenting (R. 29-48).

The majority opinion, written by PROCTOR, J., and concurred in by CLARK, J., found that "the complaint does not present a justiciable controversy" (R. 32) for the reason that, according to the majority of the Court, the action of the Attorney-General in designating the JAFRC was performed as the *alter ego* of the President in a matter wherein the action of the President was not subject to judicial review (R. 32-33) and imposed "no obligation or restraint" upon the JAFRC (R. 32) but caused the JAFRC "at most", only indirect and incidental injury (R. 34). The majority opinion proceeded further, "in view of the number of cases in this jurisdiction attacking validity of the loyalty program" (R. 35), to state briefly its views that Section 9A of the Hatch Act (R. 35), Executive Order 9835 (R. 35-36), and the action of respondents complained of are valid (R. 36); and that "nothing in the Hatch Act or the loyalty program deprives the Committee or its members of any property rights . . . Freedom of thought and belief is not impaired" (R. 36).

The dissenting opinion found that the action of the respondents was unauthorized by Executive Order 9835, be-

cause of the failure to accord petitioner notice and hearing, and, further, that said action was beyond the scope of Section 9A of the Hatch Act, because, upon the conceded allegations of the complaint, the JAFRC is not an organization comprised within the terms of said Section 9A (R. 39-40); that as respondents found and publicly stigmatized petitioner as "subversive" without notice or hearing, respondents' action was invalid on constitutional grounds (R. 40-41); that the action complained of was invalid because it impaired and abridged First Amendment rights although, upon the record before the Court, no constitutionally sufficient reason therefor appeared (R. 41-43); that petitioner had standing to sue for injury to its reputation, impairment of First Amendment rights, and loss of contributions resulting from respondents' actions (R. 43-44); and that the equity jurisdiction of the Court allowed judicial review of and relief for the action of respondents here complained of (R. 44-48).

Questions Presented

1. Whether the defamatory designation of petitioner together with the publication and circularization of that designation by respondents, concededly resulting in injury to the reputation of the organization and to its members, loss of contributions to and support of the organization, the denial of fund solicitation licenses to petitioner, the revocation of the organization's tax-exempt status by the Bureau of Internal Revenue, and the abridgement and impairment of the exercise of First Amendment rights by the organization, its members and all others similarly situated, presents a justiciable controversy.

2. Whether the stigmatizing designation of the JAFRC, deemed a conclusive determination in connection with the administration of Executive Order 9835 by respondents, presents a justiciable controversy.

3. Whether the stigmatizing and disseminated designation of the JAFRC by respondents is a reviewable exercise of executive power.

4. Whether the stigmatizing designation of the JAFRC by respondents and the public dissemination thereof by respondents to the injury of property and constitutional rights of petitioner and its members is a privileged official communication with respect to which no cause of action for injunctive or other equitable relief is available.

5. Whether petitioner, an unincorporated association suing in its organizational name on behalf of all its members pursuant to Rule 17(b)(1) of the Federal Rules of Civil Procedure, has standing to assert that the action of respondents abridges property and constitutional rights of petitioner and its members in violation of the First, Fifth, Ninth and Tenth Amendments to the United States Constitution.

6. Whether Executive Order 9835, in authorizing the public stigmatizing designation of organizations by the Attorney General of the United States without notice or hearing to those organizations, without any clearly defined standards to guide or delimit respondents in making such designation, without requiring any findings or conclusions to support such designation, and without according designated organizations any administrative or judicial review of that designation, violates: (a) the Ninth and Tenth Amendments to the United States Constitution in that it asserts powers not delegated to the Federal Government but reserved to the people and the States by the United States Constitution; (b) the Due Process Clause of the Fifth Amendment to the United States Constitution in that it unreasonably and unjustifiably abridges First Amendment rights of petitioner, its members, and all others similarly situated; and (c) the Due Process Clause of the Fifth

Amendment to the United States Constitution in that the Order on its face and as applied herein by respondents fails to accord to petitioner and others similarly situated the procedural rights and safeguards provided by that Amendment.

Specification of Errors

1. It was error for the Court of Appeals for the District of Columbia Circuit to affirm the order of the District Court granting the motion of respondents to dismiss the complaint.

2. It was error for the Court of Appeals for the District of Columbia Circuit to affirm the order of the District Court denying the motion of petitioner for a temporary injunction.

Summary of Argument

The sole, unlimited and unreviewable discretion accorded the Attorney General by Executive Order 9835 to adjudge and label organizations "subversive" without notice or hearing impairs and restrains the First Amendment rights of every individual in or contemplating federal employment; of every present or contemplated organization named, to be named, or capable of being named "subversive"; and of every person who has past, present, or contemplated membership, affiliation, or "sympathetic association" with an organization subject to designation at the pleasure of the Attorney General. Such unprecedented power violates the prohibitions contained in the First, Fifth, Ninth and Tenth Amendments to the United States Constitution.

There is no delegation of executive power in the Constitution which authorizes Executive Order 9835. In sus-

taining the Executive Order which permits the Attorney General to dictate what is orthodox and proper in the area of thought, expression and association, the Court below contravened the injunction of *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642, that in no instance does the Constitution delegate such power to an official, "high or petty." Nor may Executive Order 9835 be sustained as executive action in aid of legislation for the Order is not expressly or impliedly authorized by any legislation and, indeed, is in conflict with Section 9A of the Hatch Act. And irrespective of the constitutional source which may be claimed for Executive Order 9835, the Order is invalid for on its face and as applied it punishes civil service employees for their thoughts, beliefs, expressions, and association; it subjects designated organizations and their membership to defamation, to economic loss, to loss of good will, to loss of essential privileges, to loss of membership and support; and it imposes a prior restraint upon all organizational First Amendment activities. As this cause comes before the Court upon a motion to dismiss, it is decisive that nowhere in the record herein does it appear or is it claimed that the restraints and abridgments by respondent of activities protected under the First Amendment are based upon a clear and present danger to the civil service or our national security. Moreover, the facts *dehors* the record confirm that there is no basis for the extraordinary and repressive measures here complained of. The failure of Executive Order 9835 to require the Attorney General to grant a hearing, review, or other procedural safeguards to designated organizations further demonstrates that the Executive Order is in violation of the Fifth Amendment.

The instant cause properly raises and presents for adjudication the foregoing constitutional contentions. A justiciable controversy arose from the issuance by respondents of a defamatory blacklist which included the petitioner-

organization. Moreover, as that list is a final and irrevocable administrative determination of the petitioner's status, for the purposes of the loyalty program, which induces present and prospective federal civil servants to sever their association with the JAFRC under threat of dismissal and proscription from federal employment, the ruling of the Court below that there is here no justiciable controversy is in conflict with the decision of this Court in *Columbia Broadcasting System v. United States*, 316 U. S. 407. And the validity of the action of respondents which thus creates a justiciable controversy is the subject of judicial review as it affects private property and constitutional rights and does not involve a political question; the circumstance that the action complained of includes that of a cabinet officer purporting to exercise primary executive power is immaterial, for equity jurisdiction has frequently been extended to cabinet officers and executive power is no more immune from judicial review as to constitutionality than any other form of governmental action. Nor may respondents foreclose judicial inquiry into the constitutional propriety of their blacklist by characterizing it as a privileged official communication which will not found an action in libel; the complaint seeks declaratory and equitable relief, not money damages from respondents, and, therefore, the doctrine of privileged official communication here affords no basis for a dismissal. And, finally, the applicable decisions of this Court make plain that petitioner, an unincorporated association, has standing to raise the First Amendment issues here presented particularly since, as a matter of substantive law, petitioner represents the aggregate of the personal and property rights of its membership and sues in its organizational name only as a matter of procedural convenience pursuant to Rule 17(b)(1) of the Federal Rules of Civil Procedure.

ARGUMENT

I

This Court has jurisdiction to determine the constitutionality of Executive Order 9835.

A. The Issues Here Presented Are Justiciable

Respondents have "branded as subversive"* and, in the enforcement of Executive Order 9835, have treated the JAFRC as "disloyal" to the United States Government so that a federal employee may be dismissed or an applicant may be refused federal employment as "disloyal" if he maintains even a "sympathetic association" with the JAFRC. The uncontroverted complaint and affidavits allege that as a result substantial property and constitutional rights of the JAFRC and its members have been and will continue to be impaired; that respondents' action was purportedly done pursuant to Executive Order 9835; that the Order is unconstitutional; and that the relief sought will mitigate the wrongful injuries already inflicted and will prevent threatened further injuries from eventuating. The Court below ruled, however, that the foregoing record presented no justiciable controversy in that the action of respondents imposed "no obligation or restraint" upon the petitioner but was merely the furnishing "of information and advice" which injured the JAFRC only "incidentally" or "indirectly".

If the designation of the JAFRC as "subversive" had been uttered by a private individual it would plainly have

* Prior to the release of the first list of organizations, the then Attorney General announced that the list would be published in thirty days in order to "enable investigators to trace suspected disloyal federal employees from membership in organizations branded as subversive." *NY Times*, June 1, 1947, p. 38, col. 3.

been justiciable and, indeed, actionable *per se*.^{*} Similarly, the dissemination and implementation of a blacklist by a private employer is actionable at common law^{**} and criminal by statute in many jurisdictions.^{***}

" . . . it is clear that the effect of blacklisting may be the same as if blacklisted persons were subject to legal punishment on accusation of acts not forbidden by general law and without opportunity to disprove or justify—a power which American constitutions deny even to government. It is felt that it is only by due process of law that a person may properly be subjected to a serious penalty or stigma, and there is an accentuated ethical revulsion from the concurrence of public officials in extralegal discriminations."

Nelles, "Blacklist", 2 *Encyc. Soc. Sci.* (1944 ed.) 576, 577.

The injury to reputation and other justiciable, legally protected interests which would have been suffered by the petitioner if it had been defamed as "subversive" or "disloyal" by a private individual or employer is aggravated by the circumstance that the stigmatizing utterance was made by the highest law enforcement agent of the United States Government.^{****} For where "the hearer is in his

^{*} *Grant v. Readers Digest Association*, 151 F. 2d 733, cert. den., 326 U. S. 797; *Mencher v. Chesley*, 297 N. Y. 94; *Kaminsky v. American Newspapers, Inc.*, 283 N. Y. 748; *Spanel v. Pegler*, 160 F. 2d 619; *Wright v. Farm Journal*, 158 F. 2d 976.

^{**} *Blumenthal v. Shaw*, 77 F. 954; *Hundley v. Louisville & N. R. Co.*, 105 Ky. 162, 48 SW 429; *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, 48 SE 177; *Willner v. Silverman*, 109 Md. 341, 71 A. 962; *Masters v. Lee*, 39 Neb. 574, 58 NW 222; see 4 LRA (NS) 1118 (1904); Fitch, "Labor Blacklist", 2 *Encyc. Soc. Sci.* (1944 ed.) 578, 579.

^{***} *State v. Dabney*, 77 Okl. Cr. 331, 141 P. 2d 303; *Scheffer v. Justus*, 85 Minn. 279, 88 NW 759; *Johnson v. Stevedoring Co.*, 128 Ore. 121, 270 P. 772; *Mattison v. Lake Shore & MS Ry. Co.*, 3 Ohio Dec. 526; *Dick v. Northern Pac. Ry. Co.*, 86 Wash. 211, 150 P. 8.

^{****} The Attorney General must have appreciated the devastating consequences of the publication of his blacklist and finally did so only after considerable vacillation and indecision. Thus, although no provision is made in the Order for the public circularization of the list, from the very beginning

power" the language of the speaker may "have a force independent of persuasion." *N. L. R. B. v. Federbush Co.*, 121 F.2d 954, 957 (L. HAND, J.); see also Note, 43 *Columbia Law Rev.* 837, 942-943.

The Court below referred to three attributes of the Executive Order and the blacklist as factors determining the justiciability of this cause: (1) the blacklist was considered to contain no command to anyone to do or to refrain from doing any act; (2) neither the Order nor the blacklist was directed or addressed to the JAFRC and whatever quality as a mandate the Order or the list contained was directed to persons other than the JAFRC; and (3) the cause was not ripe for adjudication in that the blacklist was merely advice and information to be used in connection with subsequent administrative proceedings.

Upon analysis it can be seen that these three factors, neither separately nor in the aggregate, sustain the ruling of the Court below.

The essence of a justiciable controversy is not the form assumed by injurious action but the infliction of injury upon a legally protected right. Cf. *Rochester Tel. Corp. v. United States*, 307 U. S. 125. It is a basic principle of equity jurisdiction that unauthorized action by a public official causing injury to a legally protected right gives rise to a justiciable issue (*Philadelphia Company v. Stim-*

requests were made that the list be made public. *NY Times*, March 26, 1947, p. 27, col. 7; April 12, 1947, p. 19, col. 5; see also HR Rep. 616, 80th Cong., 1st Sess. (1947) 4; Hearings on HR 3588, 80th Cong., 1st Sess. (1947) 97, 106, 112, 114. Section 8(e) of HR 3818, 80th Cong., 1st Sess. (1947), the Rees Bill which was under consideration before the Congress as an alternative to Executive Order 9835, required publication in the Federal Register of those organizations designated by the Attorney General. At first the Justice Department expressed doubt that the list would ever be made public; "they fear such action would put listed organizations on their guard and lead them to change their names, thus making necessary a whole new inquiry." *NY Times*, April 13, 1947, p. 10, col. 1. On May 10, 1947 the Attorney General publicly stated that he was not decided as to whether the list would be made public. *NY Times*, May 11, 1947, p. 35, col. 3. About three weeks thereafter the Attorney General publicly announced the imminent disclosure of his blacklist. *NY Times*, June 1, 1947, p. 38, col. 3. Six months later the first list was published. *NY Times*, December 5, 1947, p. 1, col. 4.

son, 223 U. S. 605; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Ex Parte Young*, 209 U. S. 123; *Hays v. Seattle*, 251 U. S. 233; *Bell v. Hood*, 327 U. S. 678, 684; see *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U. S. 118, 137); whether that action consists of some express compulsion or deprivation is inconsequential. And so this Court has recently held that the certification of a union as a "bargaining agent" gave rise to a justiciable controversy and declared that "the fact that Wisconsin's certification was not in the form of a command is immaterial." *LaCrosse Telephone Corp. v. Wisconsin E. R. B.*, 336 U. S. 18, 23-24. Similarly in *Shields v. Utah Idaho Central R. R. Co.*, 305 U. S. 177, it was held that the determination by the Interstate Commerce Commission that a certain railway was not an inter-urban electric railway was the basis for review in a court of equity although no command was part of that determination. See also *Waite v. Macy*, 246 U. S. 606; *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Red Canyon Sheep Co. v. Ickes*, 69 App. D. C. 27, 98 F. 2d 308. The full answer to the view that administrative action must be in the form of a command to attain justiciability was supplied by *STONE, C. J.*, in *A. F. of L. v. N. L. R. B.*, 308 U. S. 401, 408:

"Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be re-examined by courts under particular statutes providing for the review of 'orders'."

Nor is justiciability dependent upon whether the governmental action complained of directs a certain course of conduct by the complaining party or others. Again the criterion is whether injury to legal rights has been suffered. It has therefore been repeatedly held, in contrast with the ruling below, that a statute or an administrative ruling may be challenged by an individual who has not thereby

been commanded to perform or refrain from any acts where that statute or ruling adversely affects the interest of the complaining party because it directs or induces others to action injurious to the complaining party. *Stark v. Wickard*, 321 U. S. 288, 303; *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Pierce v. Society of Sisters of Holy Names*, 268 U. S. 510; *Buchanan v. Warley*, 245 U. S. 60; *Truax v. Raich*, 239 U. S. 33; *Hammer v. Dagenhart*, 247 U. S. 251; *Martin v. Struthers*, 319 U. S. 141, 146. And the standing of the complaining party is not affected by the fact that the relationship thus impaired is one terminable at will (see, e. g., *Truax v. Raich*, *supra*; *Pierce v. Society of Sisters of Holy Names*, *supra*); it is sufficient that the impairment of the relationship results in injury to a legally protected interest of the complaining party.

"Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards . . . , the regulations operate to alter and affect adversely appellant's contractual rights and business relations. . . ." *Columbia Broadcasting System v. United States*, *supra*, at 422.

We turn them to the argument that the Attorney General's blacklist creates no justiciable controversy because it is said to be mere advice and information constituting, at most, only a step in the administration of the Executive Order.

To the extent that this contention depends upon characterizing the blacklisting of the JAFRC by the Attorney General as the mere dissemination of advice and information, it need not long detain the Court. This case is not *Standard Scale Co. v. Farrell*, 249 U. S. 571, where the results of an investigation by the New York Superintendent

of Weights and Measures concerning scales were published and distributed by him in a bulletin without any direction to officers or individuals to take any action on the basis of these findings. Here there was undoubtedly the dissemination of "information" by the Attorney General and the Loyalty Review Board; but there was also "something more": *Columbia Broadcasting System v. United States*, *supra*, at 422. The listing of proscribed organizations by the Attorney General was no casual, informal statement. The Attorney General prepared the organization-blacklist pursuant to the instruction contained in Part III, Section 3 of Executive Order 9835. The Order provided for the dissemination of that list by him to the Loyalty Review Board and then by that Board to all departments and agencies. On December 5, 1947, the blacklist, which had been previously furnished by the Attorney General to the Loyalty Review Board, was sent by the latter to the various federal departments and agencies administering Executive Order 9835 and at the same time the list was made the subject matter of a press release which, of course, received fulsome coverage in the press of the entire nation. *N. Y. Times*, December 5, 1947, p. 1, col. 4. Thereafter additions were made to that list and in each instance the new list was broadcast to the nation by means of press releases. *N. Y. Times*, May 29, 1948, p. 1, col. 2; April 28, 1949, p. 6, col. 4; *N. Y. Herald-Tribune*, September 16, 1950, p. 5, col. 6.

Nor did the publicizing of the list of organizations terminate with the issuance of a press release. The lists were published and republished in the Federal Register. 13 FR 1471, 1473, 3067-3068, 6135-6138, 9361, 9364-9376; 14 FR 2371, 4707-4708, 6077; 15 FR 6191. And the lists appeared again in the official Code of Federal Regulations. 5 CFR (1949 ed.) ch. II, Part 210, App. A., 200-202, 203-205; 5 CFR (1950 Supp.) ch. II, Part 210, App. A, 50-51. The blacklist of organizations was thus printed and reprinted in those organs which contain the official executive direc-

tives. The blacklists were not so recorded nor were they forwarded to the Loyalty Review Board and thence to all federal departments and agencies as academic, informative material. Under the Order the lists are to be used in the determination of the loyalty of employees and applicants (Part V, Section 2f); and loyalty boards are instructed not to "enter upon any evidential investigation . . . for the purpose of attacking, contradicting or modifying the controlling conclusion reached by the Attorney General" as to the designation of an organization. Memorandum No. 2 of the Civil Service Commission Loyalty Review Board, March 9, 1948; see also Memorandum No. 12, June 23, 1948; 13 FR 9368; *IWO v. McGrath*, 182 F. 2d 368, 374; Emerson & Helfeld, "Loyalty Among Government Employees", 58 *Yale Law J.* 1, 116 n. 430. Formally made, officially recorded, and deemed final and authoritative, the Attorney General's blacklist serves as a guide and mandate to further government action.

That the action which injured the JAFRC took the form of publicity and did not assume the more formal, orthodox and traditional forms of government action is immaterial. The development of new techniques of governmental action should not put a party out of court. The peculiar genius of equity jurisdiction is its flexibility and its adaptability, for the safeguarding of individual rights to new modes of governmental action. *Bell v. Hood*, 327 U. S. 678, 684. It is imperative that equity principles be applied to the publicity technique which has been increasingly employed by government as a sanction or regulatory device. For ostracism is a damaging penalty and a potent deterrent. The Constitution itself is replete with safeguards with respect to official judgments which would cause the party judged to be socially or politically ostracized. *United States Constitution*, Article I, §§ 3 (cl. 6, 7), 9 (cl. 3), 10 (cl. 1); Article III, §§ 2 (cl. 3), 3; Amendment V; Amendment VI; Amendment XIV, § 3. ". . . the usefulness of mere publicity as

a means for coercing action"* has been observed and the status of publicity as an instrument of governmental action, generically related to imprisonment, fines, licensing powers and other sanctions, has come to be recognized.**

"Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *United States v. National Association of Real Estate Boards*, 339 U. S. 485, 489.

VINSON, C. J., while on the Court of Appeals for the District of Columbia Circuit, declared in *Glass v. Ickes*, 117 F. 2d 273, 278 n. 9, cert. den., 311 U. S. 718, that "Public announcements may well, on occasion, be 'an action which may properly constitute an aid in the enforcement of the law'".

This Court has plainly indicated its awareness that the dissemination of a stigmatizing official judgment by an agency of government may be subject to the limits imposed upon other forms of government action. In *Keegan v. United States*, 325 U. S. 478, the Court had before it a section of the Selective Service Act which provided that it was "the expressed policy of the Congress" that vacancies caused in private employment by induction "shall not be filled by any person who is a member of the Communist Party or the German-American Bund" (50 U. S. C. App. § 308(i)). No further compulsion or sanction was contained in that section. The Government conceded that the aforesaid provision was unconstitutional, but maintained its unconstitutionality could be ignored on the grounds that the aforesaid provision was a mere "admonition." Mr. Justice BLACK, in a concurring opinion, disposed of this contention very briefly.

* Landis, *The Administrative Process* 90.

** See, e.g., Landis, *op. cit. supra*, at 90, 108-110; President's Committee on Civil Rights, *To Secure These Rights* 32; Commissioner of Investigation of the City of New York, *Annual Report* (1938) 13; Davis, "The Administrative Power of Investigation," 56 *Yale Law J.*, 1111, 1136; Note, 47 *Columbia Law Rev.* 416, 418.

"It has been urged that these defendants had no legitimate reason to protest against these provisions because they were obviously unconstitutional and amounted to no more than an admonition; *but they were an admonition sounded by the highest legislative body of the nation*" (325 U. S., 497 italics added.)

And thereafter Mr. Justice BLACK indicated that the afore-said provision violated the Bill of Attainder prohibition of the Constitution.

In *United States v. Lovett*, 328 U. S. 303, the Congress provided.

"... in § 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House Bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 14, 1943 again appointed to jobs by the President with the advice and consent of the Senate" (328 U. S., 305).

The Congressional Counsel urged that no justiciable constitutional issue was presented in an action by respondents to recover salaries earned but not paid. The argument was rejected and the statute involved was thereafter held to be unconstitutional.

"Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result" (328 U. S., 314).

To the extent that the contention under consideration depends upon the characterization of the Attorney General's blacklist as a "preliminary" administrative step, even if it is "something more" than advice and information, different questions arise. For it may be assumed,

arguendo, that not all administrative actions causing injury to legally protected interests are justiciable. Certain kinds of preliminary processes cause injury but yet are non-justiciable. *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299. As Mr. Justice DOUGLAS stated in *Ewing v. Mytinger & Casselberry*, 339 U. S. 594, 599:

“The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.”

But it does not follow that every preliminary administrative determination which may be the basis for future administrative action is non-justiciable. The promulgation of rules by an administrative agency which guide future action may create a justiciable issue. *Waite v. Macy*, 246 U. S. 606 (HOLMES, J.); *Columbia Broadcasting System v. United States*, 316 U. S. 407; see also Administrative Procedure Act, §§ 2(c), 2(g) (5 U. S. C. A. §§ 1001 (c), (g)). More particularly, the fixation of the status of an individual or concern by an agency to govern future administrative or other action has been deemed reviewable and, therefore, justiciable. In *Shields v. Utah Idaho Central R. R. Co.*, 305 U. S. 177, the Court had before it the designation of the complainant by the Interstate Commerce Commission as a non-inter-urban electric railway. Concededly, the designation of the railway by the Commission was not reviewable as an order (*Shannahan v. United States*, 303 U. S. 596),

and the designation was not made "for the purposes . . . of further proceedings by the Commission itself" (305 U. S., 183). The action was nevertheless entertained for the reason that the designation was "part of a regulatory scheme" under the Railway Labor Act (*id.*)* and for the further reason that the applicability of other legislation to the railway was premised upon "the same criterion" of whether it was an interurban railway (305 U. S., 184).**

HUGHES, C.J., concluded:

"In these circumstances we think respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status" (305 U. S., 184).

Again in *LaCrosse Telephone Corp. v. Wisconsin E. R. B.*, 336 U. S. 18, this Court held that the designation of a union as a "bargaining agent" could give rise to a justiciable controversy although that certification did not order any action or inaction by the complaining employer and although that certification might be reviewed and set aside in a subsequent administrative or judicial proceeding.

" . . . Wisconsin's certification . . . was not an abstract determination of status. Nor was it merely an interim adjudication in an uncompleted administrative process. It established legal rights and relationships. It told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions. The character of the certification was therefore such as to make it reviewable under the appropriate standards for exercise of the federal judicial power" (336 U. S., 23-24).

* Compare this aspect of the *Shields* case with the utilization of the Attorney General's list by the departmental and agency loyalty boards and the Loyalty Review Board.

** Compare this aspect of the *Shields* case with the utilization of the Attorney General's list by other agencies such as the Bureau of Internal Revenue and state licensing agencies.

A line of distinction between justiciable and non-justiciable "preliminary" administrative action emerges from the foregoing. The non-justiciable "interim adjudication in an incompleated administrative process" contemplates the possibility of further administrative or other action wherein the adjudication may be accepted or rejected. Until the completion of the administrative process the impact of the "interim adjudication" is therefore uncertain and judicial intervention before that point would interfere with the exercise of the executive discretion concerning the use of that adjudication. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41. But where a status is fixed, and "not made subject to future administrative determinations" (*Columbia Broadcasting System v. United States*, *supra*, at 420) and where status thus fixed informs those affected "with whom" they may or may not "negotiate without risk of sanctions" (*LaCrosse Telephone Corp. v. Wisconsin E. R. B.*, 336 U. S. 18, 24), a justiciable controversy is created.* The applicability of such final and binding acts of status-fixing

"to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it." *Columbia Broadcasting System v. United States*, *supra*, at 420.

* Predicating justiciability or reviewability of "preliminary" administrative action upon the completion of the administrative process, as did the dissent in *Columbia Broadcasting System v. United States*, 316 U. S. 407, 429, must presuppose that upon the completion of that process the issue preserved, if otherwise justiciable, would then be "ripe for judicial review" (*id.*, at 433). "It is sufficient . . . that there is at some stage an opportunity for a hearing and a judicial determination." *Ewing v. Mytinger & Caselberry*, *supra*, at 590. In this view of justiciability it is appropriate here to inquire when, so far as petitioner is concerned, does the action of the Attorney General become justiciable? When does the administrative process, if it is now "incomplete", become complete? Is it when the administration of Executive Order 9835 is "completed"? If so, then this controversy may never be justiciable for the program is a continuing one applicable to applicants; or judicial review is thereby postponed to a time when effective relief is no longer possible. Is it as soon as one or more employees or applicants are found "disloyal" for membership in, affiliation or sympathetic association with the JAFRC? If so, then again this controversy may never be justiciable for the Executive Order does not require reasons to be stated for determinations of

The designation of the petitioner by the Attorney General as a subversive organization comes within the principle of those cases which held that an administrative determination which is a final and binding fixation of status for the purpose of future administrative and other action is justiciable if it has a present injurious effect upon legally protected rights. *Shields v. Utah Idaho Central R. R. Co.*, *supra*; *Columbia Broadcasting System v. United States*, *supra*; *La Crosse Telephone Corp. v. Wisconsin E. R. B.*, *supra*. See *Emerson & Helfeld, op. cit. supra*, 119-120; Note, 48 *Columbia Law Rev* 1050, 1053-1054. For, as has been pointed out (see pp. 18-20, *supra*), the findings made and disseminated by the Attorney General as to whether an organization is disloyal or subversive are deemed fixed, final and mandatory in the administration of the Executive Order.*

"disloyalty" and, as organizational activities are purported to be "only one piece of evidence" in such determinations (see 13 FR 253, 254), this premise for justiciability would be virtually incapable of proof. In short, if the issues here involved are otherwise justiciable, they must be considered ripe for adjudication now or they will probably never attain such maturity. Certainly insofar as petitioner is affected by the Attorney General's blacklist, the administrative process was "completed" when that list was disseminated and deemed final for the purposes of the administration of Executive Order 9835. No administrative recourse was available to petitioner, or to any individual, to challenge the designation of the JAFRC as "disloyal" and no other further administrative proceedings were or are contemplated under the Order with respect to such designation.

* The list also had the effect of fixing the status of the JAFRC for other purposes. In one instance the Bureau of Internal Revenue declared the organization to be non-tax-exempt (*NY Times*, February 3, 1948, p. 21, (R. 26); see also *NY Times*, October 22, 1948, p. 17, col. 1, for additional listed organizations which lost tax-exemptions). The Congress has shown its understanding that so far as tax-exemptions are concerned the action of the Attorney General has finally fixed the status of the JAFRC. S. 4130, 81st Cong., 2d Sess. (1950) § 2(a) (3) (B) provided:

"... certain administrative practices of agencies . . . have been useful in providing further protection . . . including . . . the internal-revenue laws, under which exemption from taxation under Section 101 of the Internal Revenue Code is denied to certain organizations determined by the Attorney General to be subversive, and under which contributors are denied deductions for their contributions to such organizations."

Similarly, it was administratively determined that in view of the petitioner's inclusion on the list submitted to the Loyalty Review Board by the Attorney General, the organization could not be deemed a proper one by the Pennsylvania Department of Welfare for registration for a certificate to solicit funds (R. 23).

As the designation of the JAFRC by the Attorney General is final and binding, particularly so far as the administration of Executive Order 9835 is concerned, the listing of the JAFRC is more than a statement which is merely defamatory or deprecatory in nature. It is an adjudication on the basis of which sanctions of the gravest type can be and are imposed. It fixes the status of the JAFRC finally for loyalty purposes and it informs every civil servant that membership in, affiliation with, or sympathetic association with the organization exposes that civil servant to dismissal for disloyalty. Indeed, the principal purpose for the publication of the list was to put civil service employees and applicants on notice that "association" with the JAFRC will result in ineligibility. See R. 7; *NY Times*, March 26, 1947, p. 27, col. 7; HR Report 616, 80th Cong., 1st Sess. (1947) 4. Under pain of loss of job and the stigma of disloyalty, no present or prospective civil servant can venture to maintain the barest connection with the JAFRC. The action of the Attorney General is therefore no "interim" administrative report or investigatory finding—it is a determination enforceable and enforced by governmental action and sanctions. According to *Columbia Broadcasting System v. United States*, the justiciability of such a determination is beyond dispute even though that determination does not directly command action or inaction by the complaining party. As the administrative rule in *Columbia Broadcasting System* caused the parties directly governed by the rule to sever their relationships with the complaining party under threat of future governmental sanctions or action, so the designation of the JAFRC by the Attorney General has caused present or prospective civil servants to sever their connection with the JAFRC under the threat of dismissal as "disloyal" by the United States Government; in short, as the FCC rule created a justiciable issue in *Columbia Broadcasting System*, so the action of respondents has here resulted in a justiciable issue.

B. Executive Order 9835 and the Action of Respondents Thereunder Are Reviewable

The rights of the JAFRC here impaired are not only recognized property rights, but also include constitutional rights of freedom of thought, expression and association;* and the wrong committed was not merely an error in the exercise of official discretion, but the assertion of a power which exceeds the constitutional power of the executive.** Such circumstances have traditionally been deemed sufficient to invoke equity jurisdiction. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619; *Ickes v. Fox*, 300 U. S. 82, 96, 97; *Ex Parte Young*, 209 U. S. 123; see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 689-691, 710, 712-716, 731-732. But the Court below held that the Attorney General here acted as the *alter ego* of the President and that the action of the Attorney General was as non-reviewable as the action of the President would have been if he had acted himself (R. 32-33).

This is not an action against the President of the United States; he is not named as a party nor is he an indispensable party to the action. Cf. *Williams v. Fanning*, 332 U. S. 490. The circumstance that he promulgated Executive Order 9835 no more renders this a suit against the President than the circumstance that the Congress enacts a law renders a suit challenging the validity of that law a suit against the Congress. Indeed, as Executive Order 9835 has distinctively legislative features,** the analogy sug-

* *Perkins v. Lukens Steel Co.*, 310 U. S. 113, cited below (R. 34), and *Tennessee Electric Power Co. v. T. F. A.*, 306 U. S. 118, did not involve the impairment of legally protected property or constitutional rights and are, therefore, inapposite here; and *Friedman v. Schwellenbach*, 81 App. D. C. 365, 159 F. 2d 22, cert. den., 330 U. S. 838, is likewise of no force here since Friedman's status was merely that of a temporary, conditional civil servant.

** *Decatur v. Paulding*, 14 Pet. (U. S.) 497, is a typical instance wherein an alleged error in a matter resting in the administrator's discretion was held non-reviewable.

*** The Rees Bill (HR 3818, 80th Cong., 1st Sess. (1947)) was identical with Executive Order 9835 except in respects not here material.

gested is particularly appropriate. Cf. *Ex Parte Endo*, 323 U. S. 283, 298-300. Jurisdiction exists—and has been exercised—to declare unconstitutional an invalid executive order in a suit brought to enjoin an executive officer from acting pursuant to such order. See, e.g., *Panama Refining Co. v. Ryan*, 293 U. S. 388.

It has never heretofore been held that the action of a cabinet officer is non-reviewable as the action of the President. In fact, instances abound in which equity jurisdiction has been exercised over such cabinet officers. See, e.g., *Philadelphia Co. v. Stimson*, *supra*; *Ickes v. Fox*, *supra*; *Waite v. Macy*, *supra*. That jurisdiction does not dissipate because the wrong or constitutional excess committed by the executive officer is the exercise of executive power allegedly derived from the Constitution as compared with power delegated by the Congress. The doctrine of the supremacy of law had its inception, in Anglo-American law, in the subjection of the executive to judicially defined legal limits. 2 Holdsworth, *History of English Law* (3 ed. 1923) 255; Pound, *Spirit of the Common Law* 60-84; *Case of the Monopolies*, 11 Coke, 84b; *Prohibitions del Roy*, 12 Coke, 63. In *Hurtado v. California*, 110 U. S. 516, 531-532, this Court declared:

“In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial”.

Similarly, one authority has observed:

“Within the sphere of his authority under the Constitution, the Executive is independent, and judicial process cannot reach him. But when he exceeds his authority, or usurps that which belongs to one of the other departments, his orders, commands, or war-

rants protect no one, and his agents become personally responsible for their acts. The check of the courts, therefore, consists in their ability to keep the Executive within the sphere of his authority by refusing to give sanction of law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability." Cooley, *Constitutional Law* (4 ed. 1931) 203; see also *Story on the Constitution*, § 1842.

This Court has very recently indicated the test applicable to the determination of the validity of the exercise of executive power which is derived from the Constitution.

"We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field." *Ex Parte Endo, supra*, at 298.

And, accordingly, it appears that the constitutionality of executive agreements, as of treaties, is a proper subject of judicial review. *United States v. Pink*, 315 U. S. 203; Littauer, "The Unfreezing of Foreign Funds," 45 *Columbia Law Rev.* 132, 160-169; Note, 48 *Columbia Law Rev.* 890, 897. Even with respect to the executive's vast war powers, it is "well established" that "what are the allowable limits . . . are judicial questions." *Sterling v. Constantin*, 287 U. S. 378, 401; see also *Ex Parte Endo, supra*, at 299; *Scherzberg v. Maderia*, 57 F. Supp. 42; *Ebel v. Drum*, 52 F. Supp. 189. For as "executive action is not proof of its own necessity" (*Duncan v. Kahanamoka*, 327 U. S. 304, 336), it rests with this Court to ascertain when the necessity required for constitutionality exists.

It is, therefore, not surprising that, upon occasion, the action of executive officers exercising power purportedly derived from Article II of the Constitution (rather than power delegated by the Congress) has been held by this Court to be invalid. Thus in the great ruling in *Ex Parte Milligan*, 4 Wall. (U. S.) 2, the action there held violative

of the Constitution was that of an executive officer acting pursuant to a mandate of the President as Commander-in-Chief. And in *Humphrey's Executor v. United States*, 295 U. S. 602, this Court deemed invalid action by the President which was said to be an exercise of the inherent removal power of the executive—the inherent executive power here asserted by respondents.

To the extent that Executive Order 9835 is, as stated in the preamble thereto, based upon the Civil Service and Hatch Acts and is the exercise of power delegated by the Congress to the President, it is evident that the exercise of that delegated power is the subject matter of judicial review. For if a Congressional enactment governing the activities of employees of the Federal Government may be directly reviewed upon a challenge to its constitutionality (see, e.g., *United Public Workers v. Mitchell*, 330 U. S. 75; *United States v. Lovett*, 328 U. S. 303), it of course follows that the delegation of power by the Congress to the executive with respect to the federal civil service may also be the subject matter of judicial review (*Panama Refining Company v. Ryan*, 293 U. S. 388, 433).

To the extent that Executive Order 9835 is predicated upon some alleged executive constitutional power, the question of its constitutionality as presented in the instant case is a non-political and reviewable question. Here private property and other constitutional rights have been impaired to the detriment of the complaining party. Thus, while a political question may exist where "no case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill" (*Georgia v. Stanton*, 6 Wall. (U. S.) 50, 77), or where a state institutes an action as *parens patriae* on behalf of its citizens (*Massachusetts v. Mellon*, 262 U. S. 447), or where "the basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity" (*Colegrove v.*

Green, 328 U. S. 549, 552), or where a group of senators institute an action complaining of the method of adopting an amendment to the United States Constitution (*Coleman v. Miller*, 307 U. S. 433), or where a Governor of one state seeks to compel the Governor of another state to extradite a fugitive from justice (*Kentucky v. Dennison*, 24 How. (U. S.) 66), a justiciable reviewable, non-political question exists here where the complaining party bases its standing upon the impairment of private rights. Willoughby, *Constitutional Law of the United States* (1912) 437. And as the private rights here derogated are First Amendment rights, judicial review is particularly appropriate. Cf. *Ng Fung Ho v. White*, 259 U. S. 276; *Stark v. Wickard*, 321 U. S. 288, 312; Davis, "Nonreviewable Administrative Action," 96 *U. of Pa. L. R.* 749, 786-789, 792.

Indeed, no other conclusion is permissible. For if respondents herein should prevail in their assertion as to lack of jurisdiction, the JAFRC is remediless in the face of action which has concededly awful and devastating consequences upon property and constitutional rights of the JAFRC even if respondents acted in excess or violation of power delegated to them by Congress or Constitution. It cannot sue in libel; no provision is made by the Order for a hearing before the Attorney General or anyone else for corrective purposes; nor does the political arena offer a real prospect of relief for the JAFRC and other listed organizations, especially since the actions of respondents in labelling these organizations as "subversive" have the intended and actual effect of diminishing or destroying any efficacy among the electorate that such organizations might possess. Cf. *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n.4. To repeat: "Were this case to be not justiciable," executive action stigmatizing an entire organization "could never be challenged in any court. Our Constitution did not contemplate such a result." *United States v. Lovett*, 328 U. S. 303, 314.

Nor does the danger inherent in a finding that the question of the constitutionality of action under the Executive Order is non-justiciable end with the JAFRC and the other proscribed organizations. Part III, Section 3 and Part V, Section 2(f) of the Order may now allow, or could be amended to permit, the Attorney General to list religions or races as well as organizations. Of course Article VI, clause 3, as well as the Due Process Clause of the Fifth Amendment of the United States Constitution might thereby be infringed even more clearly than constitutional prohibitions are violated by the Order as it now stands. But justiciability and reviewability are not predicated upon the degree of unconstitutionality. If this Court is unable to consider the constitutionality of the present Order, it would be unable to consider the constitutionality of the hypothesized order. It is respectfully submitted that respondents may not thus escape judicial inquiry into the authority which they have asserted.

C. The Complaint States a Cause of Action for Which Relief Is Available

The Court below held that the circumstance that the designation of the JAFRC "was disclosed to the public press presents no legal ground for relief" since "in the absence of a statute imposing secrecy, it cannot be supposed that the Courts have any power to regulate or control publication of matters concerning the government's business" (R. 39).

That there must be some limits to the use of the prestige and power of high public office to stigmatize individuals and organizations is plain. The Constitution places safeguards about stigmatizing official judgments (see p. 20, *supra*), and only with respect to "Speech or Debate in either House" is it provided that "Senators and Representatives . . . shall not be questioned in any other place"

(Article I, Sec. 6, Cl. 1). Of course, good reasons may be advanced for exempting public officials from liability in damages for matter spoken or written in connection with the performance of their duties; "... it would be unfortunate if all government officers were deterred from acting in doubtful cases by fear of later personal liability. . . ." Gellhorn & Schenck, "Tort Actions Against the Federal Government", 47 *Columbia Law Rev.* 722, 724. But the foregoing exemption is not to be extended beyond actions for money damages. *Spaulding v. Vilas*, 161 U. S. 483; *Mellon v. Brewer*, 57 App. D. C. 126, 18 F. 2d 168, cert. den., 275 U. S. 530; *Jones v. Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, cert. den., 314 U. S. 665; but see Gellhorn & Schenck, *op. cit. supra*, at 738.

GRONER, C. J., has said of this exemption that "its cloak of absolute immunity offers such far reaching opportunity for oppression, that it manifestly ought not to be extended beyond the impulse that gave it being" (*Glass v. Ickes*, 117 F. 2d 273, 281, cert. den., 311 U. S. 718). Thus the inability to sue an officer in damages for matter written or spoken by him in connection with his duties does not preclude an action in equity where the matter written or spoken is widely disseminated and is utilized, as any other instrument of pressure available to government, to influence the activities of some individual or organization. For just as the inability to recover in damages from an official acting under an unconstitutional law would, obviously, be no basis for denying injunctive relief against the enforcement of that law by that same officer,* so the inability of the JAFRC to recover damages from respondents is no basis for denying the relief here sought. Indeed, the absence of an adequate remedy at law is the necessary condition for this action in equity.

* In *Jones v. Kennedy*, *supra*, acts and proceedings which had been previously held to be unconstitutional (298 U. S. 1) were deemed to be inadequate to found an action in libel.

The absence of a remedy at law for damages; the non-penalizing effect of a suit in equity upon the free exercise of official discretion; and the need for enforcing limits to and the responsibility for governmental pressures and compulsions which may be exerted through the medium of publicity* all indicate that a cause of action in equity has here been stated.

In contrast with the ruling below, and in accord with petitioner's contention is the decision of this Court in *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, where the Commission indicated that cost and price reports filed by the Utah Fuel Company would be made public at a hearing of the Commission. The Commission's determination had been held non-reviewable as an order (306 U. S., 58), but in the injunction proceedings thereafter instituted against the Commission, to restrain the disclosure of the cost and price information this Court finally held that equitable relief against the action of the Commission was available.

"Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity" (306 U. S., 60).

Similarly, in *Bank of America National Trust & Savings Association v. Douglas*, 70 App. D. C. 221, 105 F. 2d 100, an injunction was granted restraining the Securities & Exchange Commission from publicizing certain information obtained by it from the Secretary of the Treasury. In writing for his Court, GRONER, C. J., stated:

"We think the court had jurisdiction. The Bank alleged that disclosure of the information would result in irreparable injury. Since other remedy was entirely lacking, the cause was a proper one for equitable relief" (105 F. 2d, 102).

* See Note, 43 *Columbia Law Rev.* 837, 942-943.

**D. Petitioner Has Standing to Raise
the Issues Here Presented**

The Court of Appeals held that the JAFRC has no standing to complain of the deprivation of First Amendment rights on the grounds that "Those rights are personal to the individual members" (R. 40). The Court below was in error when it thus held that an unincorporated association may not assert the substantive or procedural rights guaranteed by the Due Process Clause of the Fifth Amendment. In *Grosjean v. American Press Company*, 297 U. S. 233, 244, this Court held:

"Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. *Paul v. Virginia*, 8 Wall. 168. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & L. Turnp., Road Co. v. Sandford*, 164 U. S. 578, 592; *Smyth v. Ames*, 169 U. S. 466, 522."

Again, in *Bridges v. California*, 314 U. S. 252, the Court sustained the rights to freedom of speech and press, under the Due Process Clause of the Fourteenth Amendment, asserted by corporations which were parties to that action. And in *Hannegan v. Esquire*, 327 U. S. 146, the Court indicated that a corporation could assert and rely upon the prohibitions contained in the First Amendment against the abridgement of freedom of the press. *Hague v. CIO*, 307 U. S. 496, cited and relied upon below, does not establish that the petitioner herein has no standing to assert rights arising under the Due Process Clause of the Fifth Amendment for that case was a determination under the Privileges and Immunities Clause rather than the Due Process Clause of the Fourteenth Amendment.

Moreover, the basic premise that the petitioner is asserting some right of the organization as distinct from the rights of its members, contributors and supporters, is unsound. An unincorporated association has no identity separate and distinct from its membership. The organization rather than each of the members is denominated as party plaintiff for reasons of procedural convenience only and under the authority of Rule 17(b)(1) of the Federal Rules of Civil Procedure. The status of the organization for procedural purposes does not alter the substantive law that an unincorporated association is the aggregate of its membership; the association has no rights beyond or different from those of its constituents. McKinney's Con. Laws of N. Y. Ann., General Association Law, § 12. The corollary is that the association has the same rights that its members possess. For this reason, this organization could sue in libel in its organizational name. *Kirkman; etc. v. Westchester Newspapers, Inc.*, 287 N. Y. 373; *Lubliner v. Reinlib*, 50 N. Y. Supp. 2d 786. Consequently, the rights here asserted are the rights of the various individual members and participants in the activities of the JAFRC. Since those members and participants could join in an action to eliminate restrictions upon their activities in violation of the Due Process Clause of the Fifth Amendment, it follows that the organization which may sue on their behalf may assert the same rights. *Alston v. School Board of Norfolk*, 112 F. 2d 992, 997.

II

Executive Order 9835 violates the Fifth, Ninth and Tenth Amendments to the United States Constitution in that it unjustifiably abridges freedom of thought, expression and association guaranteed under the First Amendment to the United States Constitution.

For the convenience of the Court and the petitioner this brief will not repeat in substance or language the arguments set out at pages 14 through 51 of the brief submitted by petitioner in support of the petition for writ of certiorari (hereinafter sometimes referred to as "Pet. Br."). Instead, petitioner herein incorporates the aforesaid pages by reference as part of this brief and respectfully requests the Court to refer to said pages 14 through 51 as the statement of the argument and legal principles upon which petitioner relies. The discussion under this heading is confined to considerations arising out of *American Communications Association v. Douds*, 339 U. S. 382, which was decided after the petition for certiorari was submitted.

The central feature of Executive Order 9835 is that it authorizes executive officers to inquire into, pass judgment, and impose disabilities upon individuals and organizations on the basis of thoughts, beliefs and opinions. It could not be otherwise for "Loyalty is a matter of the heart and mind. . . ." *Ex Parte Endo*, 323 U. S. 283, 302. The ultimate and principal inquiry under the Order is not whether a man or an organization has done anything,* not

* The respondent Richardson, Chairman of the Loyalty Review Board, has declared that in three years of administration of Executive Order 9835 "there has not been one single instance where espionage has been charged." *NY Herald-Tribune*, March 27, 1950, p. 4, col. 5. Indeed, one "spokesman" for the Loyalty Review Board has been quoted as explaining that the loyalty program is not directly concerned with "security"; "our job is purely and simply to determine whether an employee is loyal to our form of government." *NY Herald-Tribune*, Nov. 28, 1949, p. 26, col. 1.

even whether there has been expressed or advocated any particular doctrine;* it is whether there are "reasonable grounds to believe" that one is "disloyal". When Executive Order 9835 was promulgated there was then in existence a statute which would permit the removal of any federal employee belonging to an organization advocating the overthrow of our constitutional form of government.** And yet the President's Temporary Commission on Employee Loyalty, which drafted Executive Order 9835, stated at page 30 in its Report of November 25, 1946:

"It is the conviction of the Commission that the narrow limitations of the present statutory standards generally used for determining disloyalty, render it prudent to provide additional and more flexible criteria."

Representative Case of New Jersey, commenting on the Rees Bill, which was the Congressional counterpart of Executive Order 9835, pointed out the essential characteristic of a loyalty program:

"Until now, however, except in the case of a few so-called sensitive agencies, we have not attempted to discharge a man for an opinion. We have come to the point where we must do that." 93 CR 9149; see also *NY Times*, August 19, 1949, p. 7, col. 3; Nikoloric, "The Government's Loyalty Program", *The American Scholar*, Summer Issue 1950, 285-300.

Accordingly, Part V of the Executive Order, in defining loyalty "standards", specifies that the basic standard is the existence of "reasonable grounds . . . for belief that the person involved is disloyal to the Government of the United States" and the "activities and associations" listed in

* It was observed by a Congressional committee prior to the promulgation of Executive Order 9835 that a loyalty program was necessary because "very few individuals" openly advocate force or "belong to organizations that so advocate". House Committee on Civil Service, Report of Investigation with Respect to Employee Loyalty and Employment Policies and Practices in the Government of the United States, 79th Cong., 2d Sess. (1946) 3.

** Hatch Act, Section 9A, 5 U. S. C. A. § 118j.

Section 2 of Part V are merely factors "which may be considered in connection with the determination of "disloyalty"; overt behavior and actions, including advocacy, are therefore explicitly made by the Order only evidentiary* and the principal inquiry is into the mental beliefs and attitudes of the probed individual or organization.

This case therefore presents that issue upon which the Court was evenly divided in *American Communications Association v. Douds*, i.e., whether the political thoughts and beliefs of an individual or organization, rather than any overt action or behavior, may be made the principal and ultimate subject of official inquiry and the basis for judgment.**

The fatal defect in any system of thought-probing was early specified by Jefferson when he asked:

"... whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons."***

* "Disloyalty" could be found if none of those indicia were present; and "loyalty" found even if all existed, e.g., an agent of the F.B.I. engaging in the proscribed activities and associations for the purpose of gathering information for the F.B.I.

** In the instant case there are difficulties in the way of sustaining the validity of the thought-probing performed under the Executive Order which were not present in *American Communications Association v. Douds*, for in that case the question whether a man believed in the overthrow of our form of government by unconstitutional means was to be determined in a perjury prosecution and therefore by means of the regular judicial process with all of its rights and safeguards; under the Executive Order no such protection exists for the individual or organization under scrutiny.

*** Notes on the State of Virginia, 1781-1785, reprinted at *The Complete Jefferson* (Padover ed. 1943) 675; see also his statement in the Bill for Establishing Religious Freedom reprinted at Jones, *Primer of Intellectual Freedom* 145: "that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or suffer from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

It is respectfully submitted that, insofar as the validity of Executive Order 9835 is concerned, it is not a sufficient answer to say that

"courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *American Communications Association v. Doud*, *supra*, at 411.

The fact that judges, juries and sometimes officials weigh and pass upon the state of men's minds in some circumstances does not mitigate the evils inherent in probing and passing upon political, religious or philosophical thought and opinions. The judge, jury and official, who may be trusted to scrutinize and adjudge with impartiality and fairness whether a theft or a shooting was intended or premeditated may not with equal sanguinity be relied upon to probe and adjudge political, religious or philosophical attitudes without passion or prejudice.* We have been warned with remarkable prescience that

"men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees." *Schaefer v. United States*, 251 U. S. 466, 495 (BRANDEIS, J., dissenting).

Those judges, juries and officials whose dispassionate good sense prevails in inquiries into non-political thoughts and attitudes fail where the issue is, whether ideas are harbored which threaten the security and integrity of the state. The Star Chamber excesses were not supported exclusively by the Tudors; eminent jurists and public opinion joined in condoning the practices. 5 Holdsworth, *History of Eng-*

* The complex psychological problem in ascertaining a man's loyalty and allegiance, and the scientific approach required therefore have been suggested in Donovan & Jones, "Program for a Democratic Counter Attack to Communist Penetration of Government Service", 58 *Yale Law J.* 1211, 1236-1241.

lish Law (3 ed. 1923) 165, 196. Nor was it some evil tyrant who found that devils and witches were inhabiting New England; capable and somber judges attended by hard-headed New England juries did so. Starkey, *Devil in Massachusetts*. "Heresy trials are foreign to our Constitution" (*United States v. Ballard*, 322 U. S. 78, 86) not because "heresy" or "disloyalty" or "dangerous thoughts" are desirable, but because experience past and present demonstrates that such trials are inevitably productive of more mischief than the ideas on trial. Inquiry and condemnation based upon no tangible, manifest action are vulnerable enough to abuse where the issue is non-inflammatory; where judge, jury and official are testing the minds and hearts of men charged with challenging and jeopardizing those institutions upon which we have placed the highest moral premiums and protected by the strongest individual and collective emotions, abuse is inevitable. There is a direct ratio between the facility with which men will believe in the existence of a threat to an institution and the passion and devotion with which those men are attached to the allegedly threatened institution. The higher men consider the stakes, the less the risk men will tolerate. And it is therefore essential that acts, not thoughts, be made the criteria where one is charged as a menace to the national security. For if such a charge is not required to stand or fall upon the existence of demonstrable, tangible, factual proof of criminal action which is the subject of proof, disproof, and capable of scrutiny by all, it may be expected that "guilty" thoughts and opinions, proof of which need not be substantiated by objective facts, will be readily found where the Nation is said to be in danger.

The foreseeable consequences of thought-probing and judgment do not end with the prospect of abuse. Thought-probing violates the notion that the dignity of every individual requires that minimum of privacy which would

allow a man to think and believe without inquiry thereon. Men who may be tried and found wanting for thoughts alone can know no security. Acts they can control; they can usually predict the criminality of such acts; and proof or disproof of action is feasible. But if men can be judged for what others may think they think and believe, not for what they have done, anyone at anytime is subject to the real possibility of being found "guilty" of "disloyalty." For it "is difficult and almost impossible to meet the charge that one's general ethos is treasonable" (*Masses Pub. Co. v. Patten*, 244 F. 535, 543 (L. HAND, J.) rev'd., 246 F. 24). And, of course, men who must recite and answer for what they think are not free to think; nor are they free to read, to speak, to listen or to assemble since such activity, where thought-probing and thought-judging are allowed, may be self-incriminating. The price of thought-probing and judgment is too high; the Constitution never intended it to be paid.

Nowhere in our Constitution is it made more abundantly clear that it was intended to do away with inquiry into opinions and beliefs on matters political than in the treason clause* (*U. S. Con.*, Art. III, Sec. 3). The prototype of that clause was drafted by Jefferson** who had declared:

"But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit."***

* Disloyalty within the meaning of Executive Order 9835 is very closely akin to a charge of treason. Note that among the activities set forth as standards there are included: sabotage, espionage, treason, unauthorized disclosure of confidential matters under circumstances which indicate disloyalty, and performing public duties so as to serve the interests of another government in preference to the United States. In the Congressional debates on the Rees Bill, disloyalty and treason were closely identified. 93 CR 9120, 9132, 9142, 9149.

** See Hurst, "Treason in the United States," 58 *Harvard Law Rev.* 226, 395, 806 at 251-254.

*** Notes on the State of Virginia, 1781-1785, reprinted at *The Complete Jefferson* (Padover ed. 1943) 675.

It is not surprising therefore that the treason clause makes specified action only, and not "disloyal" thoughts or opinions criminal. Impressive scholarship on the history leading up to and surrounding the drafting and adoption of the treason clause in the United States Constitution yields the conclusion that

"The record does suggest that the clause was intended to guarantee non-violent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question." Hurst, *op. cit. supra*, at 428-429; see also *id.*, 412, 421, 431; Chafee, *Freedom of Speech in the United States* (2d ed. 1941) 170-173.

When the drafters of the treason clause omitted any reference or analogue to the crime of "compass[ing] or imagin[ing] the death of our lord the King," which was to be found in the Statute of 25 Ed. III, ch. 2 (1350), the predecessor of the English and colonial treason statutes, they indicated their intent that no penal consequences or civil disabilities should follow from "constructive treason"; i.e., crimes consisting primarily of evil thoughts and beliefs. See Ploscowe, "Treason", 15 *Encyc. Soc. Sci.* (1944 ed.) 93, 95.

"The concern uppermost in the framers' minds, [was] that mere mental attitudes or expressions should not be treason. . . ." *United States v. Cramer*, 325 U. S. 1, 28.

"... the concept [was] that thoughts and attitudes alone cannot make a treason." *id.*, at 29.

"... the requirement of an overt act is designed to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech." *id.*, at 61 (DOUGLAS, J., dissenting).

Similarly, after the Civil War, disability to hold office was imposed only upon those who, after having taken an oath to support the Constitution, "shall have engaged in insurrection or rebellion . . . , or given aid or comfort to the enemies" (*U. S. Con.*, Amendment XIV, Sec. 3). And for reasons identical to those which motivated the constitutional formulation of the treason clause, this Court has again and again stated its view that under the First Amendment mere opinions and beliefs were above and beyond any official action. *Cantwell v. Connecticut*, 310 U. S. 296, 303; *United States v. Ballard*, 322 U. S. 78, 86; *Mutual Film Corp. v. Industrial Comm.*, 236 U. S. 230, 243; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642; *Jones v. Opelika*, 316 U. S. 584, 593 (REED, J.); see also Mill, *On Liberty* (1864 ed.) 23, 27, 28; cf. *Thomas v. Collins*, 323 U. S. 516, 531.

It was suggested for the first time, however, in *American Communications Association v. Douds*, *supra*, at 408, that in some circumstances official inquiry may be made into and action predicated upon beliefs and opinions. Petitioner does not concede this proposition and relies upon the language in *West Virginia State Board of Education v. Barnette*, 319 U. S. 625, 642, where this Court stated:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are any circumstances which permit an exception, they do not now occur to us.*" (Italics supplied).

But even if circumstances may exist which would authorize thought-probing, there is no basis for assuming such circumstances here to exist. Executive Order 9835 was not and is not based upon a real or substantial threat to

our national security.* Prior to and at the time of its promulgation neither our federal civil service nor our national security had suffered any injuries or deterioration which could be said to show any evidence of "disloyal" elements in our civil service (see Pet. Br., pp. 36-43); and the experience under the Order confirms that there was never any threat to that service or security (see Pet. Br. 43-45; see also *N. Y. Herald-Tribune*, May 5, 1950, p. 1, col. 8). Whatever special problems may obtain in so-called sensitive agencies or in positions involving security considerations** can hardly justify the Order which extends to all federal employees. If the Order be considered as a preventative measure based upon possible future action without regard to the past history of the loyalty of the American civil service, then it must be remembered that there are at present sufficient statutory safeguards for our national security which legislation carries with it punishment adequate to deter and prevent any citizen, including federal employees, from espionage, sabotage, etc. (See Pet. Br. 46; see also President Truman's Message of August 8, 1950, 96 CR. 12218). Thus the Executive Board finds only very slight, if any, justification in terms of our national security. And if it is contemplated to justify the Order on the basis of "national unity" then it is appropriate to recall that in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 640-641, a similar appeal to "na-

* For studies of the experience leading up to Executive Order 9835 see Subcommittee of House Civil Service Committee, Report of Investigation with Respect to Employee Loyalty (1946); Report of President's Temporary Commission on Employee Loyalty (1947); Emerson & Helfeld, *op. cit. supra*, 8-26; Abbott, "The Federal Loyalty Program: Background and Problems", 62 *Amer. Pol. Sci. Rev.* 486; Notes, 60 *Harvard Law Rev.* 779; 47 *Columbia Law Rev.* 1161; 96 *U. of Pa. Law Rev.* 381.

** In the State Department, Department of Defense, Army Department, Navy Department, Air Force, Treasury Department (Coast Guard), Commerce Department, Justice Department, Atomic Energy Commission, National Security Resources Board, and National Advisory Committee for Aeronautics, the agency head has the "absolute discretion" to suspend and dismiss any employee "whenever he shall determine such termination necessary or advisable in the interest of the national security." Public Law 733, 81st Cong., 2d Sess., c. 803 (1950).

tional unity" was rejected and this Court stated that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." See also, Commager, "Who is Loyal to America," reprinted at Jones, *Primer of Intellectual Freedom* 25-33. National security and unity are, in any event, best served not by wholesale and indiscriminate thought-probing but by freedom.

"Freedom itself contributes to security . . . The maintenance of individual freedoms creates the greatest bulwark of our security—the energy and intelligence of free men working together to build and to save their own and their country's freedom. "Even more important, freedom and the dignity of the individual are the very foundation of our society, and the ends for which we are striving. Without them security loses its purpose." Committee for Economic Development, *National Security and Our Individual Freedom* 5.

It is traditional in criticizing governmental action which infringes upon First Amendment rights for brief writers, opinion writers and authors of articles to marshal a parade of horrors wherein the possible evil extensions of the governmental action under review are supplied by imagination. Just such speculation as to the possible extensions of the practice of thought-probing would have been necessary when the Executive Order was first promulgated in 1947. But time has supplied that which imagination would have had to produce in the past. For on September 23, 1950 the Congress authorized the Attorney General of the United States "to detain" those persons whom he has "reasonable ground to believe may" be spies or saboteurs (HR. 9490, 81st Cong., 2d Sess.*). The government which may examine into the mind and heart of a man

* See McConnell, "The Senate at Work on Subversion", *NY Herald-Tribune*, September 16, 1950. p. 8, col. 6-8, for the extraordinary circumstances surrounding the passage of this bill.

to determine whether he is "disloyal" and thereby determine whether he will in the future engage in activity inimical to the welfare of his government, by the same logic will seek and has sought to place in concentration camps men who "may be" spies or saboteurs. If the power to divine a man's thoughts, opinions and future proclivities be assumed, then it may be expected that concentration camps and prisons will be inhabited by men who have done and who have said nothing illegal, but who have been thought to entertain "dangerous" thoughts. It is timely again to ask "whom will you make your inquisitors?" for the answer is that under the Constitution there may be none. This Court should declare the Executive Order unconstitutional and thereby lay at rest the supposition that in this country men may be made to answer for their beliefs and punished for their opinions. We should "have done with this business of . . . examining other people's faiths" (*United States v. Ballard*, 322 U. S. 78, 95 (JACKSON, J., dissenting)).

III

Executive Order 9835 violates the Fifth Amendment in that organizations are designated thereunder without due process of law.

It is the basic contention of the petitioner that the power resides nowhere, and particularly not in the Attorney General, to declare an organization as "subversive" under the vague and undefinable standards contained in Executive Order 9835. But if that power be deemed to exist, and, further, if that power be deemed to reside in the Attorney General, then it is urged that the absence of essential safeguards surrounding the exercise of that power violates the Due Process Clause of the Fifth Amendment.

Executive Order 9835 authorizes the Attorney General to designate organizations "... as totalitarian, fascist, communist or subversive ..." (Part III, Section 3). It is not required that the organization be thus designated on the basis of any specified acts nor are any other limitations imposed upon the Attorney General's discretion. The Attorney General's designation is to be premised upon his evaluation of whether the ideas or opinions, about which the organization is formed, are "totalitarian, fascist, communist or subversive". The exercise of this power is delimited by no ascertainable standards, need not be preceded by any hearing or findings, and is non-reviewable by individual or organization.

If petitioner was entitled as a matter of constitutional right to a hearing before the respondents could place petitioner's name on an official blacklist, then, plainly, the Due Process Clause of the Fifth Amendment has been transgressed by respondents. For "when the Constitution requires a fair hearing, it requires a fair one ..." (*Wong Yang Sung v. McGrath*, 339 U. S. 33, 50), and the minimum requirements of a fair hearing have recently been succinctly defined.

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U. S. 257, 273.

Petitioner urges that it was entitled to and denied these minimum guarantees.

Whether the Constitution provides a right to notice and hearing is usually a question decided by history; notice and hearing is required in those cases where in the past

notice and hearing was afforded. *Ownbey v. Morgan*, 256 U. S. 94; *Den ex Dem Murray, et al. v. Hoboken Land Improvement Co.*, 18 How. (U. S.) 272; Gellhorn, *Administrative Law—Cases and Comments* (2 ed. 1947) 233-234. But history is not the exclusive determinant of whether the Constitution supplies a right to a hearing, otherwise the right would be anachronistic and dissipated as new techniques of governmental action are developed.* Accordingly, due process of law assures, at the least, that one entitled thereto will be afforded those procedures which accord with "the rudiments of fair play". *Chicago M. & St. P. R. Co.*, 232 U. S. 165, 168; *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U. S. 292, 304-305; *Morgan v. United States*, 304 U. S. 1, 15.

Even the most elementary notion of fair play dictates that before a group of Americans may be officially stigmatized as "disloyal" or "subversive" they should be heard in their own defense. Sound administration and effective fact-finding would require no less.** It is instructive that the Constitution assigns to the judiciary and the judicial process exclusively, although not without singular safeguards, the function of adjudging a man to be a traitor whether such determination results in slight, great, or no

* For analyses of the factors which determine when the right to notice and hearing arise under the Constitution see Gellhorn, *op. cit. supra*, 229-239; Freund, *Administrative Powers Over Persons and Property* 154-155; Dickinson, *Administrative Justice and the Supremacy of Law* 106-108, 190-192; Davis, "The Requirement of Opportunity to be Heard in the Administrative Process", 51 *Yale Law J.* 1093; Hale, "Hearings: The Right to a Trial, with Special Reference to Administrative Powers", 42 *Ill. Law Rev.* 749; Hankins, "The Necessity for Administrative Notice and Hearing", 25 *Iowa Law Rev.* 457; Black, "Does Due Process of Law Require An Advance Notice and Hearing?", 2 *U. of Chic. Law Rev.* 270, 271-274; Sherwood, "Administrative Procedure and Civil Liberties", 33 *Cornell Law Q.* 235, 242-243; Notes, 80 *U. of Pa. Law Rev.* 96; 34 *Columbia Law Rev.* 332.

** "Hearings thwart ignorance and arbitrary administrative action. They admit the light of public scrutiny to executive chambers. A hearing may disclose unknown facts or presently known facts in a new aspect and tends to deter corruption." Hale, *op. cit. supra*, 750-751; see also 1 Cooley, *Constitutional Limitations* (8 ed. 1927) 647; 80 *U. of Pa. Law Rev.* 96, 97.

punishment or sanctions.* Neither punishment nor sanctions is an essential prerequisite to the type of process contemplated under the Constitution before a man can be adjudged a traitor. Hurst, *op. cit. supra*, at 428 n. 150. It was intended that a man be officially adjudged and stigmatized a traitor—a label identical in odious connotation to that of “disloyalty”—only if he has had his day in court and this regardless of the extent or nature of the penal consequences attendant upon such a finding. The governing consideration is that “No party ought to be condemned unheard. . . .”**

Moreover, the issue whether an organization is “subversive” or “disloyal,” if at all possible of fair or intelligent inquiry, is of a type traditionally handled by judicial or quasi-judicial processes. Cf. Government’s argument in *United States v. Lovett*, 328 U. S. 303 as reported at 90 L. ed. 1252-1253. The issue is one of *facts* in controversy and not of policy.*** It involves not a general determination whether organizations are “subversive” or “disloyal” but a case-by-case determination whether particular organizations come within already prescribed categories.**** And each of those individual determinations are, it may be

* Although the treason clause is plainly a limitation upon powers of the Congress, it appears in Article III which defines the judicial power, thereby indicating that it was intended that the trial of the charge of treason be by the judicial process. It should be further noted that although the treason clause precisely defines the crime of treason, the quantum of proof required, and the maximum punishment, it does not prescribe the punishments or sanctions to be imposed but instead this is left to the Congress.

** British Committee on Minister’s Powers, Report, 79 (Cmd 4060, London, 1932, 1936); see also *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 581 (Webster’s Argument); *Galpin v. Page*, 18 Wall. (U. S.) 350, 368.

*** See Davis, *op. cit. supra*, *passim*.

**** This characteristic of administrative action has been deemed to be determinative of the right to notice and hearing:

“ . . . the necessity of a hearing can best be correlated with the degree of discretion as to specific cases vested in the executive (or judicial) officers. Discretion opens the door to individualization. Individual treatment demands assurance of fair play: And such assurance is given—insofar as it can be—by a hearing.” Hale, *op. cit. supra*, 761.

presumed, based primarily upon a past or present state of facts, not facts as they will or may exist.* Moreover, in the determination of whether an organization should be listed by the Attorney General, the question raised concerns the political character of the organization as a single entity and does not present a heterogeneous mass of persons raising separate, individual issues of fact. Cf. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441, 445.** Indeed, in *Shields v. Utah Idaho Central R. R. Co.*, 305 U. S. 177, 182, it was observed with respect to hearings which preceded the fixation of the complainant's status:

"And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist."

In every respect, then, there is here involved the type of governmental action which calls for the use of the adversary hearing process. As in *Walker v. Popenoe*, 80 App. D. C. 129, 131, 132, 149 F. 2d 511, 513, 514, where it was held that the barring of a publication from the mails as obscene without a notice or hearing was a denial of due process:

"In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas of due process implicit in the Fifth Amendment."

"There are no absolute and enduring standards of what is obscene. . . . The determination of whether

* See Hale, *op. cit. supra*, 758-759; Black, *op. cit. supra*, 271.

** One authority has stated that "... action affecting a single citizen almost always must be accompanied by a hearing" and concluded that "a hearing should be held whenever private interests are affected by executive action except when large groups of citizens are involved and little discretion is exercised by the officers". Hale, *op. cit. supra*, 760-761, 778; see also Hankins, *op. cit. supra*, 463-468; Black, *op. cit. supra*, 271.

a publication violates such changing standards is certainly one which should not be undertaken without a hearing.

Nor do any sound reasons occur to foreclose to petitioner the right to a hearing. Inherent executive power as well as delegated executive power is subject to conformance with the Due Process Clause of the Fifth Amendment.* *Ex parte Endo*, 323 U. S. 283, 299; Willoughby, *Constitutional Law of the United States* (1912 ed.) 338. There is no emergency which makes it impossible to expend the time which may be necessary for a fair hearing. Cf. *Lawton v. Steele*, 152 U. S. 133; *Hirabayashi v. United States*, 320 U. S. 81. And the action of the Attorney General in blacklisting petitioner does not merely deprive the JAFRC of a privilege subject to withdrawal at will, for a man is entitled to his fair name and reputation not as a matter of grace or privilege, but as a matter of right. Cf. *United States v. Lovett*, 328 U. S. 403. Nor does the blacklisting of petitioner by the Attorney General otherwise come within a category of government action, such as exclusion of aliens (see, e.g., *United States v. Shaughnessy*, 338 U. S. 337), tariffs (see, e.g., *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294), legislation, etc., which traditionally may be taken without notice or hearing.** History does not deny what fair play here commands.

It is anticipated that alleged considerations of administrative convenience and necessity may be urged by respondents as a basis for contending that petitioner was

* Hurst, *op. cit. supra*, 443, points out that "The treason clauses are clearly limitations upon all the agencies of government, instead of being addressed directly to the legislative branch only."

** Plainly the action of the Attorney General does not fall within that classification of action wherein government employees may in some circumstances be refused employment or be dismissed without notice or hearing for petitioner does not sue in the capacity of a government employee complaining of dismissal or an applicant complaining of denial of employment. It is significant that the Executive Order makes some pretense at granting a hearing to employees (Part II, Section 2), but no comparable gesture is made towards organizations which are on the blacklist.

rightfully "branded as subversive" without notice and hearing. Such considerations are not entirely without weight where they exist. But even then it must be remembered that

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay . . ." *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U. S. 292, 305 (CARDOZO, J.)

Moreover, it is submitted that no such considerations are in fact present with respect to adjudging the "loyalty" of an organization. The State of New York made just such a determination the subject of administrative hearings in its recent *Feinberg Law*.^{*} And the Congress has found no reasons of administrative exigency or national security to deter the Congress from requiring hearings in recent legislation wherein the political characterists and loyalty of organizations are to be ascertained.^{**} In fact, even the House Committee on Un-American Activities has recognized the infirmities of the procedure employed by respondents. A recent report of a sub-committee thereof stated, in connection with a proposed bill which required the registration of designated organizations:

"The bill provides for administrative hearings in the Department of Justice in those cases where Communist Party front organizations refused to register voluntarily. During this hearing the organization will be given an opportunity to present witnesses in its own behalf, as well as being provided with other safeguards. Full judicial review of the findings of the Attorney General is provided. The subcommittee believes that this provision constitutes a landmark in that it provides for the establishment of proper legal procedures which will eventually re-

^{*} McKinney's Con. Laws of N. Y. Ann. (1950 Supp.), Education Law § 3022 (2).

^{**} HR 9490, Sec. 14(c)(d) 81st Cong. 2d Sess. (1950).

place the ex parte findings under the present loyalty order." Report of the Subcommittee on Legislation of the Committee on Un-American Activities (1948) 5.

Many years before the promulgation of Executive Order 9835 we were enjoined:

"Remember, there are very precious values of civilization which ultimately, to a large extent, are procedural in their nature. . . . All tribunals, administrative or judicial, have to inquire and examine before they decide. Historic experience lies behind the right to a day in court, and a full day."*

Nowhere is it more appropriate or necessary that full, fair and open hearings be insisted upon than in those instances where an official sits in judgment on political beliefs and opinions. Historically many of the elements of our tradition of fair and public trials derive as a reaction to the secret, *ex parte*, Star Chamber proceedings for the trial of political dissenters. *In re Oliver*, 333 U. S. 257, 268-271; Radin, "The Right to a Public Trial," 6 *Temple Law Q.* 381.

"It may be true that a ministerial officer, in a secret and private investigation, may strive to ascertain the truth and to do justice, but unless we blind our eyes to the history of the long struggle in the mother country to secure protection to the liberty of the citizen, we must realize that a public investigation before a judicial tribunal, with the assistance of counsel and the privilege of cross-examination, is the best, if not the only, way to secure that right." *United States v. Sing Tuck*, 194 U. S. 161, 179 (BREWER, J., dissenting).

Today, as always, the power to adjudge political orthodoxy by officials—who ever tend to identify themselves with the state and therefore to identify political dissent from their

* Address of Mr. Justice FRANKFURTER, quoted at Duane "Mandatory Hearings in the Rule-Making Process", 221 *Annals* 115, 116.

views with disloyalty to the state—is inherently and necessarily subject to abuse; and so, today as always, such power, if it must exist, urgently requires that it be exercised by means of open and fair hearings, the method which best assures truth* as well as justice to those on trial.

On the facts and on the record herein the JAFRC is a lawful organization acting through lawful means to achieve lawful objectives—yet it has been publicly designated as “subversive” by the Attorney General of the United States. Executive Order 9835 empowers that official, who has the duty to prosecute organizations which seek to overthrow our form of government, to adjudge and stigmatize, without prosecuting, an organization as “subversive.” Cf. *Masses Pub. Co. v. Patten*, *supra*, at 542-543. The Executive Order authorizes the Attorney General to use the prestige and power of his office to label an organization as “subversive” even where there is absent evidence which would satisfy a judge and a jury that such organization is illegal. This, then, suggests the reason why no notice and hearing was afforded the JAFRC or any other of the designated organizations. A hearing would demonstrate that no evidence exists for imposing upon the JAFRC the odious stigma with which it has been labelled by the Attorney General.** However sufficient such a reason may appear to an executive officer intent upon minimizing those administrative “difficulties” which are inherent in a democratic system of justice, that reason is a basis for rather than a bar to the conclusion that the action of the respondents herein complained of violates the procedural safeguards of the Due Process Clause of the Fifth Amendment.

* We were wisely counselled early in our history by Franklin—that in proceedings based upon charges of crimes akin to disloyalty “perjury [is] too easily made use of against innocence”. Hurst, *op. cit. supra*, 403.

** In a formal press release, the Department of Justice has declared that it “has always instituted prosecution in cases where the facts warrant it. This is particularly true in cases involving subversive activities . . . It is patently absurd and unbelievable that the Department of Justice in cases of this character would fail to institute prosecution, were the requisite evidence available.” *NY Times*, September 30, 1948, p. 15, col. 3, 5 (emphasis supplied).

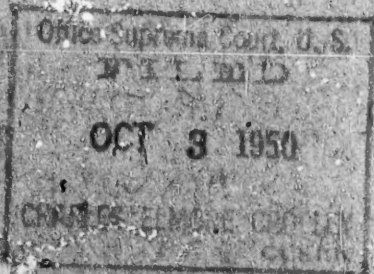
CONCLUSION

It is respectfully submitted that the order and judgment of the Court below be reversed and that the motion to dismiss the complaint be denied and petitioner's motion for a preliminary injunction be granted.

O. JOHN ROGGE,
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✓ *Attorneys for Petitioner.*

MURRAY A. GORDON,
Of Counsel.

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No. 8

In the Supreme Court of the United States

OCTOBER TERM, 1950

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
PETITIONER

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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PETITIONER**

v.

**J. HOWARD McGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The order of the District Court for the District of Columbia dismissing the complaint was entered without opinion (R. 28-29). The opinion of the Court of Appeals for the District of Columbia Circuit (R. 29-48) is reported at 177 F. 2d 79.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1949 (R. 49). A petition for rehearing, filed August 26, 1949 (R. 50), was

denied on September 22, 1949 (R. 51). On December 12, 1949, by order of Mr. Chief Justice Vinson, the time for filing a petition for a writ of certiorari was extended to, and including, January 25, 1950 (R. 53). The petition for a writ of certiorari was filed on January 25, 1950, and was granted on March 13, 1950 (R. 54). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner has any legal standing or right to challenge a designation, made by the Attorney General pursuant to instructions issued by the President under Executive Order 9835, that petitioner is a communist organization.

STATUTE AND EXECUTIVE ORDER INVOLVED

Section 9A of the Hatch Act, 53 Stat. 1148, 5 U. S. C., Supp. II, 118j, and Executive Order 9835, 12 F. R. 1935, are set forth in the Appendix to the Brief for Respondents in *Bailey v. Richardson*, No. 49.

STATEMENT

On March 21, 1947, the President, "by virtue of the authority vested in [him] by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i),¹

¹ Now 5 U. S. C., Supp. II, 118j.

and as President and Chief Executive of the United States," issued Executive Order 9835 (12 F. R. 1935) to establish standards and machinery for determining the loyalty of federal employees and applicants. The Executive Order provided for the investigation of all persons now employed by the Federal Government or applying for such employment, for the establishment of Loyalty Boards in each department or agency, and for the establishment within the Civil Service Commission of a Loyalty Review Board. The Department of Justice was directed to furnish the Loyalty Review Board with "the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." (Part III, Section 3.) In turn, the Loyalty Review Board was directed to disseminate such information to all departments and agencies (Part III, Section 3a).

The standard prescribed by the Executive Order for the refusal of employment, or the removal from employment, on grounds relating to loyalty is that "on all the evidence, reasonable

grounds exist for belief that the person involved is disloyal to the Government of the United States" (Part V, Section 1). One of the activities and associations which "may" be considered in connection with the determination that reasonable grounds exist for belief that a person is disloyal is membership in, affiliation with, or sympathetic association with any organization listed by the Attorney General (Part V, Section 2f).

On November 24, 1947, the Attorney General addressed a letter to the Chairman of the Loyalty Review Board, listing organizations and groups determined by him to fall within the description of Part III, Section 3, of Executive Order 9835. 13 F. R. 1471. Petitioner was included in this list. By letter dated December 4, 1947, the Chairman of the Loyalty Review Board transmitted a copy of the Attorney General's letter to the various departments and agencies, pursuant to Part III, Section 3a, of the Executive Order. 13 F. R. 1471. In September 1948, the Attorney General divided the listed organizations into the separate categories named in the Executive Order, and petitioner was designated as a communist organization. This, too, was transmitted by the Chairman of the Loyalty Review Board. 13 F. R. 1635.

Petitioner alleges that, as a result of this designation and publication by the Attorney General, its ability to carry out its charitable activities

of collecting and disbursing funds for the benefit of anti-fascist refugees who fought against the Franco Government in Spain has been irreparably damaged (R. 3-4). The injuries alleged are these: (a) the Bureau of Internal Revenue has deprived petitioner of its status as a tax exempt organization; (b) petitioner has been refused licenses required of organizations soliciting funds; (c) many former contributors, including present and prospective Federal employees, have reduced or discontinued contributions; (d) many potential contributors, including present and prospective Federal employees, have declined to make contributions; (e) petitioner has encountered increased difficulty in renting space to conduct activities, and reservations of facilities have been cancelled; (f) prominent speakers and entertainers, refuse to participate in petitioner's activities; (g) and members and other participants have been subjected to public shame and ridicule, thereby discouraging further participation (R. 6).

This action was brought on February 10, 1948, to enjoin respondents, the Attorney General and the Chairman and members of the Loyalty Review Board of the Civil Service Commission, from designating and publicizing the name of petitioner as a communist organization, and to direct respondents to remove petitioner's name from the list of designated Communist organizations, to make a public statement of this removal,

and to take no action based on the inclusion of petitioner's name in the list of designated communist organizations. Petitioner further prayed for a declaratory judgment that Executive Order 9835, and Section 9A of the Hatch Act, as applied by the Executive Order, are unconstitutional because repugnant to the First, Fifth, Ninth, and Tenth Amendments (R. 7, 8). Simultaneously; petitioner moved to convene a three-judge court pursuant to 28 U. S. C. 380a, and for a preliminary injunction (R. 8-10).

Respondents, in turn, moved to dismiss the complaint for want of a justiciable controversy between the parties and for failure to state a claim upon which relief can be granted (R. 28). Following a hearing, the District Court, on June 4, 1948, dismissed the complaint and denied the motion for a preliminary injunction (R. 28-29). The Court of Appeals, one judge dissenting, affirmed (R. 49).

SUMMARY OF ARGUMENT

I

A. Petitioner lacks standing to assert that the loyalty program, or any aspect of it, is void under the First Amendment. The Executive Order and the Attorney General's list of organizations do not, in their genesis, on their face, or in their operation purport to control petitioner's activities. Petitioner remains perfectly free to collect and disburse funds in the same manner as it

has always done; it is free to conduct meetings and other functions, to express itself freely through its officers and members; it is not prevented in any fashion from uttering, or publishing and distributing its beliefs. Insofar as petitioner's fund-raising abilities may have been impaired as the result of unfavorable public opinion, such indirect consequences of the publication of investigative findings have no legally operative effect on First Amendment rights. However, if it be assumed *arguendo* that adverse publicity constitutes a sufficiently direct "discouragement" to give standing to petitioner, it is clear that, in the particular circumstances presented, the challenged executive action stands consistently with the First Amendment.

B. Petitioner argues, however, that more than publicity is here involved. It asserts that the Attorney General's designation definitively fixed its status for all purposes under the Executive Order and hence is a regulation directly affecting it whose validity it has standing to review. We do not dispute that a determination of status which unconditionally subjects a person to legal consequences may give rise to a justifiable claim by such person. And recognizable derivative claims may also exist in one who has been deprived of an advantageous legal relationship with the person or group directly controlled. But we believe that petitioner can not qualify in either category

so as to attain standing to challenge the administration of the Executive Order.

1. Petitioner's own existing or future legal status remains unchanged. Neither the Executive Order nor the Attorney General's list contain any directive to other federal, state, or municipal officials which in any way subjects petitioner to the contingency of future administrative action. They subject petitioner to no criminal or civil penalties either immediate or postponed. Accordingly, no occasion for ^{judicial} federal action is presented; the controlling principle is familiar. See *e. g.*, *United States v. Los Angeles & St. L. R. Co.*, 273 U. S. 299.

2. Petitioner's case is not improved by considering its standing as derivative. The designation of petitioner as a Communist organization creates no justiciable controversy between the Government and those Federal employees who may be members of petitioner. The Executive Order does not require such employees to disassociate themselves from petitioner's activities nor does it bar other federal employees from becoming members. Participation in the activities of a designated organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion based on all the evidence that reasonable grounds exist for belief that the employee involved is disloyal. Since petitioner's designation by the Attorney General does not, as to any of its members who may be federal employees, impose

any obligation, deny any right, or fix status, such employees have no standing to challenge that designation. Since the designation does not result in the unconditional regulation of petitioner's relationships with federal employees, it follows *a fortiori* that petitioner likewise has no standing.

II

A. Petitioner further urges that it has been defamed by the Attorney General's designation, and that, although it "cannot sue in libel" it does have standing to obtain equitable relief. Relief in the suit for defamation thus pleaded is barred, however, by a long recognized privilege. As petitioner concedes, it is well settled that utterances public officials made in the exercise of official duties are absolutely privileged. The important principles of public policy upon which the privilege is grounded require its application to suits in equity as well as in law.

B. The occasion for recognition of the privilege is particularly compelling in the circumstances of this case. In designating petitioner as a Communist organization, the Attorney General was acting as the agent and *alter ego* of the President in the exercise of primary executive power. Accordingly, his act was a political act and beyond the control of any other branch of the Government except in the mode prescribed by the Constitution through impeachment. It is significant in this connection that petitioner is

asking the Court to restrain a Cabinet officer from reporting to the President, or to the agency designated by him, the result of an investigation undertaken pursuant to the President's order, on the ground that that result is erroneous. The President's power to require the opinion of the heads of the executive departments is an integral incident of his office specifically provided for in the Constitution. Article II, Section 2. The Attorney General having been directed by the President to determine and publish the list had the clear duty under the Constitution to comply. The determinations made by the Attorney General in fulfillment of that duty are essentially political, not judicial in nature. They are decisions of a kind for which the judiciary neither has the responsibility nor the facilities to review. Cf. *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. 103.

ARGUMENT

INTRODUCTORY STATEMENT

This is one of a group of cases which attack the validity of Executive Order 9835 establishing the government employee loyalty program. Basic challenges to that program made by an affected employee and raising central procedural and substantive issues are presently before the Court in *Bailey v. Richardson et al.*, No. 49, this Term.² Respondents' brief in the *Bailey* case

² The same questions are presented by the petition for certiorari in *Washington et al. v. McGrath*, No. 229, this Term.

fully demonstrates the occasion for, and the validity of, the loyalty order. The present case, however, raises a threshold question of standing to sue, in that no government employee is a party to this proceeding, and petitioner does not even purport to represent any such employee.³

The procedures prescribed by Executive Order 9835 in passing on government employee loyalty are fully described in the brief for respondents in No. 49, pp. 14-24. The standard prescribed by the Order for denying employment is that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Part V, Section 1). Among the activities and associations which "may be considered" in connection with the determination of disloyalty is (Part V, Section 2 (f)):

Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution

³ *National Council of American-Soviet Friendship, Inc., et al. v. McGrath*, No. 7, this Term, certiorari granted on May 15, 1950, and *International Workers Order v. McGrath*, No. 71, this Term, are similar to the present case.

of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

The Department of Justice is directed currently to furnish to the Loyalty Review Board, for dissemination to all departments and agencies, the name of each organization so designated by the Attorney General (Part III, Section 3).

In accordance with the provisions of the Order, the Attorney General, after appropriate investigation and determination (Brief for Respondents in No. 49, p. 23), designated petitioner a Communist organization and notified the Loyalty Review Board of that finding. And, in accordance with the provisions of the Order, the Loyalty Review Board transmitted that finding to the various departments and agencies.

It is this ^{designation} ~~legislation~~ and publication which petitioner attacks. The complaint consists of various allegations as to impairments of the organization's fund-raising activities, claimed to have resulted from the public disparagement caused by the designation and publication (*supra*, p. 5). Petitioner essentially contends that the President lacked the power to require the designation of organizations for use in passing upon employee loyalty, praying that respondents be enjoined from " * * * designating, declaring, circulating or publicizing" petitioner's name as a designated organization, that the designation be publicly retracted, and that respondents be directed to take no action on the basis of the in-

clusion of petitioner's name in the designated list (R. 8-9). To this specific challenge to one portion of the loyalty program, petitioner adds a generalized charge that the entire Executive Order and Section 9A of the Hatch Act "as applied" are invalid and prays for a declaration to this effect (R. 7, 8).⁴

The nature of the prayer and of the arguments advanced by petitioner emphasize that petitioner's quarrel with the Government is essentially political in nature. Much of its argument is addressed to the wisdom of the loyalty program and to assertion that it was politically motivated. (E. g. Pet. 36-49, incorporated by reference in its Brief at p. 38.) To strike down the program as an entirety, not merely to test the validity of a particular aspect of its administration, seems to be the purpose of the suit. Petitioner pre-

⁴ The instant case presents no occasion for consideration of the validity of Section 9A of the Hatch Act. The Attorney General's designation of petitioner as a subversive and communist organization is not a designation under section 9A which, by its terms, applies only to an "organization which advocates the overthrow of our constitutional form of government in the United States." Organizations coming within the purview of Section 9A have been separately listed by the Attorney General as organizations which seek "to alter the form of government of the United States by unconstitutional means," and petitioner is not so designated. See Appendix to Brief for Respondents in No. 49, p. 145; Directives of the Loyalty Review Board, 5 CFR (1949 ed.) 210.11 (b) (6), 220.2 (a) (6), 230.2 (a) (6). It is plain that Section 9A in no way, directly or indirectly, interferes with petitioner's activities.

mises its attack on the contention that its designation as Communist by the Attorney General is, whether true or not, an abridgement of its First Amendment freedoms (Br. for Pet. pp. 38-48). To buttress this main contention, petitioner further asserts that the Executive Order is void under the Ninth and Tenth Amendments.⁵ As a secondary constitutional argument, petitioner urges that the loyalty program fails to meet due process requirements under the Fifth Amendment (Br. for Pet. pp. 48-56). We submit that the court below properly held that these contentions fail to present a justiciable constitutional controversy.

Constitutional questions aside, petitioner seeks to justify a claim to equitable intervention by reference to the general law of defamation. As we show, *infra*, pp. 35-50, official utterances of the type here involved are absolutely privileged. This facet of petitioner's argument, accordingly, presents no claim upon which relief can be granted.

⁵ It is difficult to perceive that reference to these constitutional provisions adds anything to petitioner's case. The Ninth and Tenth Amendments do not create rights in the individual but impose duties owed to the body politic. In contending, therefore, that the Executive Order is, under the Ninth and Tenth Amendments, ultra vires of the power of the Executive, petitioner merely reasserts, in different form, its basic position that its First Amendment rights have been abridged. Accordingly no further reference will be made herein to the Ninth and Tenth Amendments.

THE COMPLAINT DOES NOT PRESENT A JUSTICIABLE
CONSTITUTIONAL CONTROVERSY

"The most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." Frankfurter, J., concurring in *United States v. Lovett*, 328 U. S. 308, 318 at 320. "For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *United Public Workers v. Mitchell*, 330 U. S. 75, 89. "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240-241.⁶ The requirement, for justiciability, that a case or controversy be presented, has been uniformly applied in suits against government officers, complaining of unlawful conduct by the officers. In such cases, the Court has found jurisdiction absent unless it be shown that the plaintiff "has sustained or is immediately in danger

⁶ That the Federal Declaratory Judgment Act does not enlarge the basic jurisdiction of the courts and does not create controversies where none existed before has been affirmed many times by this Court. *United Public Workers v. Mitchell*, *supra*; *Federation of Labor v. McAdory*, 325 U. S. 450, 461; *Colegrove v. Green*, 328 U. S. 549, 551-552; *Coffman v. Breeze Corps.*, 323 U. S. 316, 324; *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240; *United States v. West Virginia*, 295 U. S. 463, 475; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 262.

of sustaining some direct injury" to a private substantive legally protected right. *Massachusetts v. Mellon*, 262 U. S. 447, 488; *Tennessee Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 137-138.⁷ Here, there is no such showing.⁸

A. THE ATTORNEY GENERAL'S DESIGNATION OF PETITIONER AS A COMMUNIST ORGANIZATION, FOR THE PURPOSE OF THE LOYALTY PROGRAM, DOES NOT INVADE OR ABRIDGE PETITIONER'S FIRST AMENDMENT RIGHTS

Examination of the specific injuries alleged (*supra*, p. 5) reveals clearly that petitioner lacks standing to assert that the loyalty program is repugnant to the First Amendment.

⁷ Thus where the legal injury threatened is the indirect injury which may result to every stockholder from injury to the corporation (*Pittsburgh & West Virginia Ry. Co. v. United States*, 281 U. S. 479, 487; *Schenley Distillers Corp. v. United States*, 326 U. S. 432); or the indirect injury to a consumer arising out of the fixing of minimum prices under an alleged unconstitutional statute (*Atlanta v. Ickes*, 308 U. S. 515); or the indirect injury to a federal taxpayer or citizen resulting from allegedly unconstitutional or unlawful federal action (*Frothingham v. Mellon*, 262 U. S. 447; *Fairchild v. Hughes*, 258 U. S. 126; *Frahn v. Tennessee Valley Authority*, 41 F. Supp. 83 (N.D. Ala.)); or the indirect injury to particular silver producers because of the failure of the Secretary of the Treasury to purchase silver under the Pitman Act, 40 Stat. 35 (*United States ex rel. American Silver Producers Assn. v. Mellon*, 32 F. 2d 415 (C. A. D. C.), certiorari denied, 280 U. S. 561), the suit must fail for want of a justiciable controversy.

⁸ Cf. *Thompson v. Wallin*, 95 N. Y. S. 2d 784 (App. Div. 3rd Dept.) (Feinberg Law); *Hammond v. Lancaster*, 71 A. 2d 474 and *Hammond v. Frankfield*, 71 A. 2d 482 (Md.) (Ober Law).

These allegations amount to no more than that petitioner's fund raising abilities have been impaired as the result of unfavorable public opinion. Admittedly, public opinion was influenced by publication of the result of the Attorney General's investigation. But such unfavorable publicity has no legally operative effect upon petitioner's constitutional rights. The injuries of which petitioner complains arise from the force of public opinion and not from the direct action of respondents. The Hatch Act, the Executive Order, and the Attorney General's list are intended solely to secure the employment in the Federal Government of those loyal to our constitutional form of government. Neither in their genesis, on their face, nor in their operation, do they purport to control petitioner's activities or to impose any legal consequences upon such activities. And in so far as members of the public may have refused to participate in, or aid, petitioner's fund raising activities, by declining to make contributions, declining to speak or entertain at petitioner's fund raising affairs, or declining to make facilities available to petitioner for meetings, such action has not been the result of any direction, requirement, or even suggestion on the part of respondents.⁹ Petitioner remains

⁹ It is a complete distortion of the intent and purpose of the Attorney General's list to conceive of it as a "blacklist" calculated to injure petitioner by harassment and villification. The list of designated organizations was furnished the

perfectly free to collect and disburse funds in the same manner as it has always done; it is free to conduct meetings and other functions, to express itself freely through its officers and members; it is not prevented in any fashion from uttering, or publishing and distributing its beliefs.

We submit that the indirect consequences of public disclosure are not within the purview of the First Amendment. Such indirect consequences may result from any public investigation by Congress or the Executive. The First Amendment does not provide that Congress or the Executive may not inform the public; it provides that "Congress shall make no law * * * abridging the freedom of speech or of the press." It was not intended to protect persons against unfavorable public opinion, even though such opinion may be stimulated by disclosures made by or to an investigating body.¹⁰ Petitioner points

Loyalty Review Board only by way of information and advice. That is made clear by the terms of the Executive Order and letter of the Attorney General (Appendix to Brief for Respondents in No. 49, pp. 137-138).

¹⁰ The incongruity of petitioner's argument that publicity alone which exposes persons to adverse public sentiment unconstitutionally restrains freedom of speech is demonstrated by the inapplicability of the "clear and present danger" test to the power of investigation. Although that test may govern the power of Congress to regulate speech, it cannot limit the power of Congress or the Executive to inquire, and concomitantly, to publicize their findings. For Congress would be unable intelligently to determine whether or not there was a clear and present danger warranting legislation unless it could obtain evidence as to the circumstances in which there

to no case, and we do not believe that any exists, that holds that executive or legislative action which neither orders someone to do or refrain from doing something nor withholds any privilege or license but merely publicizes the result of investigation is an unconstitutional restraint upon First Amendment Rights."

was no such danger as well as in which there was. Cf. *Barsky v. United States*, 167 F. 2d 241, 246-247 (C. A. D. C.), certiorari denied, 334 U. S. 843.

"Petitioner in No. 7, *National Council of American-Soviet Friendship, Inc. v. McGrath*, cites *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, and *Thomas v. Collins*, 323 U. S. 516, for the proposition that judicial relief is available where "the governmental action merely exposed persons to conduct or attitudes of other persons which might have a restraining effect on the liberties of the complaining parties" (Br. for Pet. pp. 18-19). As we read the cases, it is clear that the standing of the petitioners therein was not thus grounded. In the *McCollum* case, petitioner predicated her standing to sue on the grounds that she was a local taxpayer and that the "released-time" program of Illinois subjected her child to humiliation as a non-conformist. The Court held that petitioner had standing as a local taxpayer and apparently did not reach the sufficiency of her other contention. 333 U. S. at 206, citing *Coleman v. Miller*, 307 U. S. 433, 443, 445, 464. But see *Jackson, J.*, concurring, 333 U. S. at 232-233. On the merits, the Court concluded that the "released time" program was void as "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *Id.*, at 210. In *Thomas v. Collins*, there was no question that petitioner had standing since he had been sentenced to a fine and imprisonment for contempt of a court order issued under the provisions of a state statute. Further, this Court's opinion nowhere suggests that the statute in question, which required labor union organizers to register with the Secretary of State before soliciting members, was void because it subjected petitioner to unfavorable public

A contrary philosophy, sanctioning investigation and correlative disclosure in aid of legislation or law enforcement, is embedded in our system of government.¹² No change or occasion for change in this philosophy is apparent. Rather, current American political belief, whether liberal or conservative, continues to support full freedom of investigation and disclosure.¹³ Current

opinion. In fact, the audience addressed by petitioner was fully aware of his union position and sympathetic toward the arguments advanced in his speech.

¹² Thus statutory provisions frequently require disclosure. *E. g.*, newspapers using the mails, 37 Stat. 533, 39 U. S. C. 233; Securities Act of 1933, 48 Stat. 74, 15 U. S. C. 77a; Food, Drug, and Cosmetic Act, 52 Stat. 1040, 1041, 21 U. S. C. 321; Alien Registration Act, 54 Stat. 673, 8 U. S. C. 452; registration of foreign agents, 52 Stat. 631, 22 U. S. C. 611; registration of lobbyists, 60 Stat. 839, 2 U. S. C. 261; oath of allegiance as condition on privilege of suit against United States in Court of Claims, R. S. 1072, 28 U. S. C. 265; cf. *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419; *Bryant v. Zimmerman*, 278 U. S. 63, 72; *Lewis Publishing Co. v. Morgan*, 229 U. S. 288.

¹³ For example, the principle of disclosure has been advanced by persons most zealous to protect civil liberties as the appropriate way of preserving those liberties. The Report of the President's Committee on Civil Rights (*To Secure These Rights*, U. S. Govt. Printing Office, 1947) concluded that (pp. 52, 53) :

"The principle of disclosure is, we believe, the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups.

* * * *

"* * * The Federal government * * * ought to provide a source of reference where private citizens and groups may find accurate information about the activities,

judicial decisions reaffirm this view by declining to recognize First Amendment claims to inviolability by individuals or groups as a block to investigation and disclosure in the field of national security. Cf. *Lawson v. United States* and *Trumbo v. United States*, 176 F. 2d 49 (C. A. D. C.), certiorari denied, 339 U. S. 934, rehearing denied, 339 U. S. 972; *Eisler v. United States*, 170 F. 2d 273 (C. A. D. C.), certiorari granted, 335 U. S. 857, cause removed from docket until further order of the Court, 338 U. S. 189, writ dismissed, 338 U. S. 883; *Barsky v. United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States v. Josephson*, 165 F. 2d 82 (C. A. 2), certiorari denied, 333 U. S. 838, rehearing denied, 333 U. S. 858.

In this connection it is appropriate to state to the Court our position on the validity of petitioner's First Amendment contention. The decisive issue here is standing to sue and we believe that petitioner plainly fails to present a justiciable controversy. However, if it be assumed *arguendo* that adverse public opinion constitutes a sufficiently direct "discouragement" to give petitioner standing in Court, we submit that there is no improper invasion of any of petitioner's First Amendment freedoms.

sponsorship, and background of those who are active in the market place of public opinion.

As this Court recently pointed out in *American Communications Assn. v. Douds*, 339 U. S. 382, 399, "when particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." In the instant case, as in the *Douds* case, "we have here no statute which is either frankly aimed at the suppression of dangerous ideas nor one which, although ostensibly aimed at the regulation of conduct, may actually 'be made the instrument of arbitrary suppression of free expression of views.'

* * * There are involved here none of the elements of censorship or prohibition of the dissemination of information * * * " (*Id.* at 402-403). The purpose of the Executive Order is to insure the loyalty of those in the Government service. The substantial necessity, in the public interest, for the issuance of the loyalty order, demonstrated in the respondents' brief in the *Bailey* case, No. 49, pp. 24-56, 79-99, serves to sustain the validity of the executive action even as to those directly affected. What we have said in that brief substantially answers petitioner's contentions here.

We need make only one further comment. The challenge here runs merely to one feature of the

administration of the program, one which has no compelling or controlling effect either on government employees whose loyalty is being examined or on the organizations designated for consideration in that process. Loyalty or disloyalty is a state of mind. Assessment of loyalty or disloyalty must be aided by examination of overt acts and objective facts in so far as such facts are obtainable. In addition, determinations as to loyalty must be inferred from words and conduct. It seems obvious that an essential step in the process of screening government employees is the ascertainment of the character of the organizations with which an employee is affiliated, if any, and the nature and extent of his affiliation. Centralization of the examination into the character of organizations for the purpose of the loyalty program by imposing the duty of investigation and designation upon the Attorney General not only locates the inquiry in the hands of the officer best equipped to deal with it but also serves to avoid the discrimination and unevenness that might result if separate loyalty boards, existing in the several departments and agencies, were faced with the necessity of making the determination independently. Accordingly we submit that the designation of subversive organizations by the Attorney General for the purposes of the loyalty program could not be successfully challenged under the First Amendment.

B. THE ATTORNEY GENERAL'S DESIGNATION OF PETITIONER AS A COMMUNIST ORGANIZATION, FOR THE PURPOSE OF THE LOYALTY PROGRAM, NEITHER FIXES PETITIONER'S STATUS NOR CONTROLS PETITIONER'S ACTIVITIES SO AS TO CREATE A JUSTICIABLE CONTROVERSY

Petitioner argues, however, that more than publicity is here involved. It asserts that the Attorney General's designation definitively fixed its status for all purposes under the Executive Order and hence is a regulation directly affecting it whose validity it has standing to review. We do not dispute that a determination of status which unconditionally subjects a person to legal consequences may give rise to a justiciable claim by such person. And recognizable derivative claims may also exist in one who has been deprived of an advantageous legal relationship with the person or group directly controlled. But we believe that petitioner cannot qualify in either category so as to attain standing to challenge the administration of the loyalty order.

1. Neither petitioner's action nor status are directly affected by the Attorney General's designation

The challenged executive order is in no way designed to control petitioner's activities. Neither the statute, the Executive Order, nor the Attorney General's list require the resignation of petitioner's members nor do they bar the entry of new members. They contain no directive to other federal, state, or municipal officials which in any way subjects petitioner to the contingency of future administrative action. They subject

petitioner to no criminal or civil penalties, either immediate or postponed." In brief, petitioner's own existing and future legal status remains unchanged.

Thus, the complaint alleges that, as a result of the Attorney General's designation of petitioner as a communist organization, the Bureau of Internal Revenue has deprived it of its status as a tax exempt organization (R. 6). This allegation has no basis in fact. As we have already pointed out, petitioner's legal status is unaltered by the Hatch Act, the Executive Order and the Attorney General's list. The tax status of petitioner is determined solely by Section 101 (6) of the Internal Revenue Code, 26 U. S. C. 101 (6), which grants an exemption to charitable corporations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." If petitioner were previously entitled to an exemption, it is still so entitled. Petitioner's quarrel is with the Commissioner of Internal Revenue, not with respondents who exercise no functions under the Internal Revenue Code in this connection; its remedy lies in a proceeding against the Commissioner in a proper case under the Code, not against respondents. So far as the record shows,

¹ Cf. *Shields v. Utah Idaho R. Co.*, 305 U. S. 177; *La Crosse Tel. Corp. v. Wis. Employment Relations Board*, 336 U. S. 18, 24; *Waite v. Macy*, 246 U. S. 606.

petitioner has not seen fit to avail itself of the legal remedy thus afforded. Moreover, since such a legal remedy is available, it clearly has shown no occasion for equitable intervention.

For like reasons, petitioner's allegation that it has been refused licenses to solicit funds fails to establish the existence of a present controversy with these respondents (R. 6). The grant of such licenses by states or municipalities depends upon the laws or ordinances of those bodies. In no way does the statute, the Executive Order, or the Attorney General's list purport to define petitioner's status under those laws or ordinances. Again, petitioner's quarrel is with those local officials, not respondents, and it is not shown that petitioner has taken any legal action before them to vindicate its reputation or its rights.

Since the executive action in question does not unconditionally subject petitioner to legal consequences, either embodied in statute or regulation, no occasion for judicial action is presented.¹⁵ The controlling principle is familiar.

¹⁵ In this connection, it is instructive to compare the executive action here challenged with the provisions of the Internal Security Act, P. L. 831, 81st Cong., 2d sess. Unlike the Attorney General's designation of organizations for the purposes of the loyalty program, P. L. 831 does impose unconditional legal consequences on those organizations found to come within its terms. For example, Communist organizations and their members are required to register with the Attorney General, civil and criminal penalties being imposed for failure to register. Registration unconditionally

United States v. Los Angeles & St. L. R. Co., 273 U. S. 299; *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. 103; *Federal Power Commission v. Hope Gas Co.*, 320 U. S. 591, 619; *United States v. Atlanta B. & C. R. Co.*, 282 U. S. 522, 527, *Ex parte Williams*, 277 U. S. 267, 271; *Penna. Federation v. P. R. R. Co.*, 267 U. S. 203, 215; *Penna. R. R. v. Labor Board*, 261 U. S. 72, 85; *Standard Scale Co. v. Farrell*, 249 U. S. 571, 574; *Employers Group, Etc. v. National War Labor Board*, 143 F. 2d 145, 147 (C. A. D. C.), certiorari denied, 323 U. S. 735; *National War Labor Board v. Montgomery Ward & Co.*, 144 F. 2d 528 (C. A. D. C.), certiorari denied, 323 U. S. 774; *National War Labor Board v. United States Gypsum Co.*, 145 F. 2d 97 (C. A. D. C.), certiorari denied, 324 U. S. 856, rehearing denied, 324 U. S. 890.

Petitioner attempts to avoid the impact of these decisions by urging that they be given an extremely limited reading convenient to its purpose here. Singling out the *Los Angeles* case, for example, petitioner argues that that decision be construed to mean only that efforts to obtain judicial review are premature if they challenge an interim step in an ultimately reviewable ad-

results in the loss of income tax exemption to organizations and in ineligibility of its members for employment by the Federal Government and defense plants. The Act provides for a full administrative hearing and judicial review of the question whether a particular organization comes within its purview.

ministrative proceeding. Concededly, the *Los Angeles* case can be, and often is, cited in the manner suggested. However, that case, as well as the other cases cited, clearly stands for the much broader proposition that the jurisdictional requirement that a case or controversy be presented is not met where the challenged governmental activity has no legally compulsive effect on the one who seeks to attack it. Cf. *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. at 112-113. This Court has observed that the principle of non-justiciability of advisory opinions or investigative findings, given classic formulation by Mr. Justice Brandeis in the *Los Angeles* case (273 U. S. at 309-310), is not merely a matter of deference to the special functions of administrative agencies but is rooted in, and required by, Article III, Sec. 2 of the Constitution. *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 131.

2. *Since the Attorney General's designation is not controlling in passing upon the loyalty of government employees, petitioner lacks derivative standing*

Petitioner's case is not improved by considering its standing as derivative. To attain derivative standing, petitioner contends that the Attorney General's designation irrevocably fixes its status for administrative proceedings with regard to the eligibility for Federal employment of its members. Concededly, the Attorney General's designation thus fixes its status in the sense that designation is not subject to reexamination

in particular loyalty proceedings. But, as analysis of the cases relied on by petitioner reveals, this does not suffice to give standing to petitioner. Petitioner must also show that the determination of such status unconditionally results in the ineligibility for Federal employment of its members and thus directly controls its relationships with such members. Examination of the facts evidences that this essential element of petitioner's claim to derivative standing is entirely missing.

a. *The Rationale of Petitioner's Cases.*—Petitioner places principal reliance on such cases as *La Crosse Tel. Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18; *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Pierce v. Society of Sisters*, 268 U. S. 510; *Buchanan v. Warley*, 245 U. S. 60; and *Truax v. Raich*, 239 U. S. 33. In each of these cases, the challenged statute or regulation allegedly invaded a legally protected right of the individuals or groups to whom it was directly addressed, thus creating a justiciable controversy as to them. Since the coercive effect of the statute or regulation upon those individuals or groups was such that it necessarily resulted in the regulation of the advantageous relationships between those individuals or groups and complainant to complainant's detriment, a justiciable controversy likewise existed as to complainant.

Thus, in *Pierce v. Society of Sisters*, *supra*, a private school was permitted to test the validity of a statute which restrained the liberty of par-

ents and destroyed its property rights by requiring parents to send their children to public schools. In *Truax v. Raich, supra*, an alien was able to challenge a statute which restrained the liberty of his employer and conditioned his right to work by requiring the employment of not less than a stated percentage of native citizens or qualified electors. In *Buchanan v. Warley, supra*, a white person whose property rights were restricted by an ordinance which forbade the occupancy of certain areas by Negroes was permitted to attack the constitutionality of that ordinance in a suit for specific performance of a contract to sell his house to a Negro. And in *La Crosse Tel. Corp. v. Wisconsin Employment Relations Board, supra*, an employer was permitted to attack an order which designated a bargaining agent and subjected the employer to sanctions for failure to comply with the certification.

Similarly, in the *Columbia Broadcasting System* case, upon which petitioner primarily relies, the Columbia System was held to have standing to challenge a regulation of the Federal Communication Commission which, although directed at subsidiary radio stations, altered the status of the Columbia System's contracts with those stations. The regulations prohibited certain provisions of network-affiliation contracts and required the Commission unconditionally to reject, and authorize it to ~~cancel~~, licenses of affiliated stations on the grounds specified in the regula-

tions. *Id.* at 418. The Court pointed out that the regulations operated to control future administrative action and determined in advance the rights of those affected by it, the only question for later determination in any given case being whether an affiliated station's contract with a network is within the terms of the regulation. *Id.* at 420.

b. *Petitioner's cases are inapplicable here.*—In the instant case, however, the designation of petitioner as a Communist organization creates no justiciable controversy between the Government and those federal employees who may be members of petitioner. The Executive Order does not require such federal employees to disassociate themselves from petitioner's activities nor does it bar other federal employees from becoming members. In short, the fixing of petitioner's status as Communist for the purposes of the loyalty program does not result in the ineligibility for federal employment of its members. We do not have here the direct and near-automatic disruption of relationships which, in the *Columbia Broadcasting System* case, led the Court, in order to prevent the complete destruction of major economic interests by alleged invalid present regulation, to consider a challenge to government action on the part of one to whom that action was not directed.¹⁶

¹⁶ The complaint contains no allegation as to the number or proportion of petitioner's membership which consists of federal employees, or of the extent of the claimed injury attributable to the alleged dropping out of federal employees.

As already noted, the Attorney General's list merely furnishes information to the various departments and agencies. The standard for denying Federal employment is that "on *all* the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." Concerning the evidentiary weight to be given the designation of organizations by the Attorney General, the Loyalty Review Board has specifically stated that (5 C. F. R. (1949 ed.) pp. 195-196, 200):

* * * * *

The probative value of evidence of past or present membership in, affiliation with or sympathetic association with, any one or more of the organizations so designated by the Attorney General can be fairly evaluated only after determining; so far as possible, the character of the organization, the period, nature and duration of the association, whether the employee or applicant was aware of the subversive character of the organization at the time of such association, and the nature of his activities in connection with such organization.

* * * * *

In connection with the designation of these organizations, the Attorney General has pointed out, as the President had done previously, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with, or

sympathetic association with, any organization designated is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. "Guilt by association" has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide.

* * * * *

Accordingly, the Attorney General's list of designated organizations does not establish controlling criteria for determinations of disloyalty. Participation in the activities of a designated organization is "simply one piece of evidence which may or may not be helpful" in arriving at a conclusion based on all the evidence that reasonable grounds exist for belief that the employee involved is disloyal. It is apparent, therefore, that, since petitioner's designation by the Attorney General does not, as to any of its members who may be federal employees, impose any obligation, deny any right, or determine status, such employees have no standing to challenge that designation. Since the designation does not result in the unconditional regulation of petitioner's relationships with federal employees, it follows *a fortiori* that petitioner likewise has no standing to challenge the designation.

Finally, it should be noted that, in the cases upon which petitioner relies, the challenged governmental action was the exercise of regulatory power over private business. Here, on the other hand, the Executive Order, and the action taken pursuant to it, relates solely to the internal management of the Government. The President did no more than prescribe conditions to govern executive agencies in the selection of their employees, and instruct the Attorney General to advise them with respect thereto. To do so, within the limits of his constitutional and statutory authority, was the right and duty of the Chief Executive. The employment and discharge of its civil servants, and the establishment of terms and conditions which must be met by employees or applicants for employment, are internal administrative matters concerning which the United States is free to act as it pleases, without judicial compulsion or restraint at the insistence of an outsider such as petitioner. Cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 128; 129. And see Brief for Respondents, *Bailey v. Richardson*, No. 49.

II

PETITIONER'S ALLEGATION THAT IT HAS BEEN
DEFAMED DOES NOT STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED

As we have shown, there is no basis for petitioner's assertion that respondents' action is, as to petitioner, repugnant to the First and Fifth

Amendments. The gravamen of the complaint thus resolves itself to the alleged damage to "the favorable reputation, moral support, and good will of the American people enjoyed by plaintiff" (R. 4).¹⁷ Relief in the suit for defamation thus pleaded is barred, however, by a long recognized privilege, particularly applicable in the circumstances of this case.

A. OFFICIAL STATEMENTS ARE ABSOLUTELY PRIVILEGED

As petitioner concedes (Br. for Pet. 33-35), it is well settled that utterances of public officials in the exercise of official duties are *absolutely* privileged, irrespective even of a claim of malicious motivation.¹⁸ *Spalding v. Vilas*, 161 U. S. 483; *Jones v. Kennedy*, 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Glass v. Ickes*, 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Smith v. O'Brien*, 88 F. 2d 769 (C. A. D. C.); *United States v. Brunswick*, 69 F. 2d 383 (C. A. D. C.); *Mellon v. Brewer*, 18 F. 2d 168 (C. A. D. C.), certiorari denied, 275 U. S. 530; *Farr v. Valentine*, 38 App. D. C. 413; *De Arnaud v. Ainsworth*, 24 App. D. C. 167, writ

¹⁷ Although petitioner admits that it "cannot sue in libel" (Br. p. 32), its suit is clearly an attempt to do just that. Thus it argues that if its designation as subversive had been uttered by a private person it would be actionable, and hence it should be when uttered by the Attorney General (Br. pp. 14-15).

¹⁸ There is no allegation of malice herein.

of error dismissed, 199 U. S. 616.¹⁹ The privilege is applicable not only to communications between Government officials but also to communications released generally to the press. *Spalding v. Vilas, supra*; *Glass v. Ickes, supra*; *Mellon v. Brewer, supra*.

To come within the privilege, "it is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute * * *; or even that they should be specifically directed or requested by a superior officer. * * * It is sufficient if they are done by an officer 'in relation to matters committed by law to his control or supervision.' * * *; or that they have 'more or less connection with the general matters committed by law to his control or supervision.' * * *." *Cooper v. O'Connor*, 99 F. 2d at 139, repeated in *Glass v. Ickes, supra*, at 278.

¹⁹ Cf. *Gregoire v. Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; *Dodez v. Weygandt*, 173 F. 2d 965 (C. A. 6); *Gibson v. Reynolds*, 172 F. 2d 95 (C. A. 8), certiorari denied, 337 U. S. 925; *Laughlin v. Rosenman*, 163 F. 2d 838 (C. A. D. C.); *Adams v. Home Owners' Loan Corp.*, 107 F. 2d 139 (C. A. 8); *Cooper v. O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; *Phelps v. Dawson*, 97 F. 2d 339 (C. A. 8); *Lang v. Wood*, 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; *Standard Nut Margarine Co. v. Mellon*, 72 F. 2d 557 (C. A. D. C.), certiorari denied, 293 U. S. 605; *Brown v. Rudolph*, 25 F. 2d 540 (C. A. D. C.), certiorari denied, 277 U. S. 605; *Yaselli v. Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 603; See American Law Institute, *Restatement, Torts* § 591.

Thus, there can be no question here that the alleged defamation was privileged; the designation of petitioner as a communist organization by the Attorney General was made in accordance with a duty expressly imposed by the President.

Petitioner's contention that there is no privilege if the authority pursuant to which respondents acted is unconstitutional overlooks the important principles of public policy upon which the privilege is grounded. "The public interest requires that persons occupying such important positions * * * should speak and act freely and fearlessly in the discharge of their important official functions" (*Yaselli v. Goff, supra*, at 406, affirmed, 275 U. S. 603, repeated in *Gregoire v. Biddle, supra*, at 580, certiorari denied, 339 U. S. 949), and their privilege cannot be made to depend upon the ultimate outcome of a judicial determination of the validity of the particular authority under which they act or speak. "Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service." (*De Arnaud v. Ainsworth, supra*, at 178, repeated in *Cooper v. O'Connor, supra*, at 141-142).

Nor is this privilege limited to actions for money damages, as petitioner asserts (Br. for Pet. 33-35). *United States v. Los Angeles & St. L. R. Co., supra*; *Hearst Radio v. Federal Com-*

munications Commission, 167 F. 2d 225 (C. A. D. C.); *Tinkoff v. Campbell*, 86 F. Supp. 331 (N. D. Ill.). In the *Los Angeles* case, a railroad company, seeking to suppress a final valuation report of the Interstate Commerce Commission, contended that the suit should be entertained under the general equity power of the Court. It was urged "that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public." 273 U. S. at 314. Holding that "No basis is laid for relief under the general equity powers," the Court declared that "Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." 273 U. S. at 314-315.²⁰

Petitioner's argument that a cause of action in equity has been stated because there is no adequate remedy at law misconceives the nature of concurrent equity jurisdiction. Where equity jurisdiction is concurrent only, as here, it is a

²⁰ *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56; *Bank of America National Trust & Savings Association v. Douglas*, 105 F. 2d 100 (C. A. D. C.); *American Sumatra Tobacco Corp. v. Securities & Exchange Commission*, 93 F. 2d 236 (C. A. D. C.) do not hold to the contrary. In those cases, the issue was not whether equity would enjoin a defamation but whether equitable relief was available to enjoin the public disclosure of confidential information supplied by the complainant in violation of statutory provision assertedly forbidding such disclosure.

necessary condition for the exercise of such jurisdiction that a cause of action exist at law for which the law does not provide an adequate remedy. Here, it is plain that that condition is not met. Petitioner's complaint is not that there is no adequate remedy at law but that the law does not recognize that any of petitioner's rights have been infringed, *i. e.*, that there is no cause of action at law. "The existence of a privilege whether consensual or irrespective of the other's consent prevents an act or omission which would otherwise be tortious from so being and, therefore, protects the actor from even being subject to liability." American Law Institute, *Restatement, Torts*, § 10, Comment a. Since there is no tort at law, there is no basis for concurrent equity jurisdiction.

As a matter of policy, we can perceive no justification for the contention that official privilege from suit for defamation be confined to suits at law. The occasion for recognition of the privilege is as great, if not greater, where the attack is brought in equity. The foundation of the doctrine of the privilege is that the interest of the individual must give way to the public interest in unfettered expression of executive opinion. It is apparent that, whatever the form of judicial review, the heavy burden upon government officials in terms of time and manpower necessary to a defense of their public statements would place a serious restraint upon their ex-

pression of executive opinion. And there can be no question that the threat of prosecution for contempt for non-compliance with an injunction is as effective a deterrent to the exercise of their public functions as the threat of money damages at law. Finally, it is obvious that effective government can be far more seriously impaired by a remedy which runs to official functions as well as to the persons of public officials. Cf. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682. As this Court has recognized, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Yakus v. United States*, 321 U. S. 414, 441.

B. THE OCCASION FOR RECOGNITION OF THE PRIVILEGE IS PARTICULARLY COMPELLING HERE

The application of these well-settled principles is here reinforced by fundamental doctrine which has been undisputed since the beginning of the Republic. No argument is necessary to demonstrate that the present time of tension and danger demands the utmost vigor and vigilance on the part of the President to take action which he deems required in the interest of national safety. See brief for respondents, *Bailey v. Richardson*, No. 49, pp. 24-57. That protection against infiltration by adherents of Communism forms a

significant part of the national security problem has been tragically demonstrated again and again in recent history. Cf. *United States v. Dennis*, 183 F. 2d 201 (C. A. 2).

The constitutional basis for the President's ability to act in this sphere lies in the vesting in his office of all executive power and in his duty to execute the laws. Article II, Sections 1, 3. The power is one which far transcends specific grants by Act of Congress. *Myers v. United States*, 272 U. S. 52, 151-164. The duty of the President to execute the laws includes "the rights, duties and obligations growing out of the Constitution itself * * * and all the protection implied by the nature of the government under the Constitution." *In re Neagle*, 135 U. S. 1, 64.

That this basic Presidential power fully validates the loyalty program is demonstrated by the brief for respondents in *Bailey v. Richardson*, No. 49, pp. 59-99. Insofar as the specific aspect of that program here involved—the Attorney General's designation of subversive organizations—is concerned, we have already shown that screening of loyalty of government employees involves an assessment of state of mind, a process which may reasonably include consideration of associations. *Supra*, p. 11. Moreover, we think it axiomatic that the broad Presidential power to execute the laws must always include the right to

speak forth freely to the nation.²¹ Every society possesses the power to defend itself and it is the President's duty and his right to inform the people of those groups whose activities are, in his judgment, inimical to the public welfare. His duty to inform the nation is particularly compelling when, as here, organizations are, in his opinion, engaging in activities that constitute a threat to our democratic process and form of government. To assert that the President cannot do so is to turn the Constitution upon itself, to strip the Government of the power of self-preservation and the means of communicating with its citizens. As Circuit Judge Chase has stated in a similar context (*United States v. Josephson*, 165 F. 2d 82, at 88-89 (C. A. 2), certiorari denied, 333 U. S. 838, rehearing denied, 333 U. S. 858):

* * * One need only recall the activities of the so-called fifth columns in various countries both before and during the late war to realize that the United States should be alert to discover and deal with the seeds of revolution within itself. And if there be any doubts on the score of the power and duty of the Government and Congress to do so, they may be resolved when it is remembered that one of the very purposes of the Constitution itself was to protect the

²¹ In this connection, it is pertinent to observe that the Constitution specifically requires of the President that "He shall from time to time give to the Congress Information of the State of the Union * * *." Article II, Section 3.

country against danger from within as well as from without. See *The Federalist*, Nos. II-X. Surely, matters which potentially affect the very survival of our Government are by no means the purely personal concern of anyone.

In exercising this broad power to inform the nation of potential threats to its existence, the President is immune from judicial restraint. Cf. *Mississippi v. Johnson*, 4 Wall. 475. It is true, as asserted by petitioner, that this power is subject to abuse. That is a risk inherent in the Constitution, a risk calculated and advisedly taken by our founding fathers.

* * * Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. (*The Federalist*, No. LXX.)

* * * it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision (*Id.*, No. LXXI).

Should the President overstep himself, there is opportunity to replace him by the elective process,

or he may be impeached. Petitioner complains that such recourse is inadequate; the short answer is that the Constitution permits no more.

We think it plain that the President has this power to designate those who, in his judgment, are hostile to the national welfare and equally plain that he may exercise it through the head of an executive department. Cf. *Williams v. United States*, 1 How. 290; *Wilcox v. Jackson*, 13 Pet. 498; *Myers v. United States*, *supra*, at 117. That the President utilizes a Cabinet officer as his agent does not alter the nature of the act so as to attach different consequences as to judicial review. Where the duties are political duties and the officials are acting as the agent of the President, the actions of those executive heads are beyond the control of any other branch of the Government except in the mode prescribed by the Constitution through impeachment. *Kendall v. United States*, 12 Pet. 522, 610. In this connection, the observations of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, retain their full vitality (*Id.* at 165-166):

* * * the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. * * * In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and

cannot, at his discretion, sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

Herein, the President has directed the Attorney General to investigate and determine which organizations fall within the classifications of the Executive Order and to make this information available to those charged with the administration of the loyalty program. Although the Attorney General exercised his discretion in deciding which organizations came within the scope of the Executive Order, it is clear that the composition and publication of the list was done in the exercise of primary executive power, with the Attorney General acting as the agent and *alter ego* of the President. At the court below observed (R. 36), "the fact that they were done by the Attorney General, for and at the President's

direction, does not change their essential character as acts of the President himself."

Aside from the fact that the action of the Attorney General is thus not reviewable since it is, in contemplation of law, the act of the President, there is a further constitutional basis, one which emphasizes the political nature of the action here challenged, for considering the designation of subversive organizations as solely within the executive domain. Petitioner essentially demands that the Court restrain a cabinet officer from reporting to the President (or to the agency designated by him) the result of investigation undertaken pursuant to the President's order, on the ground that the report is erroneous. The President's power to require the opinion of the heads of the executive departments is an integral incident of his office. (The Federalist, No. LXXIV) specifically provided for in the Constitution. Article II, Section 2.²² No clause in the Constitution is meaningless, and least of all this one which "recognizes a public duty of high importance and value in critical times." Story, *Commentaries on the Constitution* (5th ed. 1891) § 1493.²³

The Attorney General, a member of the Cabinet, having been directed by the President to

²² See, also, R. S. 354, 356, 5 U. S. C. 303, 304.

²³ The authority of the President to require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their

determine and publish this list, had the clear duty under the Constitution to comply. That duty is delicate and complex, a duty given definition by the confidential relationship between the Chief Executive and his Cabinet. Determinations made by the heads of departments in the fulfillment of

respective offices refers, of course, to the duties both of the President and of the officer, and has been so exercised.

"Mr. Jefferson has informed us that, in Washington's administration, for measures of importance or difficulty, a consultation was held with the heads of the departments, either assembled, or by taking their opinions separately, in conversation or in writing. In his own administration, he followed the practice of assembling the heads of departments, as a cabinet council. But he has added, that he thinks the course of requiring the separate opinion in writing of each head of a department is most strictly in the spirit of the Constitution; for the other does, in fact, transform the executive into a directory. 4 Jefferson's Corresp. 143, 144." Story, *supra*, Section 1493; note 4.

"We find abundant evidence, both in the public archives and in the printed correspondence and other writings of Washington and Jefferson, that it was the practice in their time for the President not only to call for written opinions of the Attorney General, as at present, and to advise orally or by informal correspondence with him and the three Secretaries, but also to require of all these officers written opinions upon critical subjects of executive deliberation, as expressly provided by the Constitution.

"Conspicuous illustration and evidence of these facts may be deduced from the extracts given in the text and the notes to Washington's writings. (See e. g., vol. x, p. 321, note; vol. x, p. 546, note.) In one of these cases it will be perceived that the Cabinet, so called, consisting of the Secretary of State, Secretary of the Treasury, Secretary of War, and Attorney General, though not in any sense an organized body with legal attributes as such, yet proceeded to act in concert, adopting joint rules, signed by them, as to the political and

that duty are essentially political, not judicial, in nature. They are decisions of a kind for which the judiciary neither has the responsibility nor the facilities to review. Cf. *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. 193; *Standard*

military questions pending between the United States and France." 6 Ops. Atty. Gen. 326, 330 (Attorney General Cushing).

Although the Constitutional Convention rejected the suggestion of a privy council, and assumed that the President alone would be responsible to the nation for the acts of his principal officers, this clause was enacted in order that the President might have the advice, and the power to require the advice, of strong counsellors. And it is certain that there was no inhibition on the publication of such opinions. It was for the people to see and judge what these counsellors had advised.

Thus, James Iredell (later Mr. Justice Iredell) before the Constitutional Convention of North Carolina (Elliot: *Constitutional Debates* (1830) pp. 103-104):

"The next part, which says, 'That he may require the opinion in writing of the principal officers,' is, in some degree, substituted for a council. He is only to consult them if he thinks proper. Their opinion is to be given him in writing. By this means he will be aided by their intelligence, and the necessity of their opinions being in writing, will render them more cautious in giving them, and make them responsible should they give advice manifestly improper. This does not diminish the responsibility of the president himself. They might otherwise have colluded, and opinions have been given too much under his influence. * * * It is, however, much to be desired, that a man who has such extensive and important business to perform, should have the means of some assistance to enable him to discharge his arduous employment. The advice of the principal executive officers, which he can at all times command, will, in my opinion, answer this valuable purpose. He can at no time want advice, if he desires it, as the principal officers will always be on the spot. These officers, from their abilities and experience, will prob-

Scale Co. v. Farrell, 249 U. S. 571; *Employers Group, etc. v. National War Labor Board*, 143 F. 2d 145 (C. A. D. C.), certiorari denied, 323 U. S. 735.²⁴

ably be able to give as good, if not better advice, than any counsellors would do; and the solemnity of the advice in writing, which must be preserved, would be a great check upon them."

And Mr. Gerry, before the Constitutional Convention:

"I am in favr. of a council to advise the Ex—they will be the organs of information of the persons proper for offices—their opinions may be recorded—they may be called to acct. for yr. Opinions. & impeached—if so their Responsibility will be certain, and in Case of misconduct their punishment certain—" Farrand: *Records of the Federal Convention of 1787*, Vol. I, p. 70.

Mr. Madison:

"Mr. Maddison [sic] was of opinion that an Executive formed of one Man would answer the purpose when aided by a Council, who should have the right to advise and record their proceedings, but not to control his authority." *Ibid.*, p. 74.

²⁴ Compare the long-established principle that mandamus will not issue to review non-ministerial acts. See *Decatur v. Paulding*, 14 Pet. 497, 515; *Gaines v. Thompson*, 7 Wall. 347; *Litchfield v. Register and Receiver*, 9 Wall. 575, 577; *Carrick v. Lamar*, 116 U. S. 423, 426; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324; *West v. Hitchcock*, 205 U. S. 80, 85; *Ness v. Fisher*, 223 U. S. 683, 691-692; *Alaska Smokeless Coal Co. v. Lane*, 250 U. S. 549, 555; *Hall v. Payne*, 254 U. S. 343, 347; *Work v. Rives*, 267 U. S. 175, 183; *Wilbur v. United States*, 281 U. S. 206, 218; *I. C. C. v. New York, N. H. & H. R. Co.*, 287 U. S. 178, 208; *United States ex rel. Chicago Gt. Western R. R. v. I. C. C.*, 294 U. S. 50, 62; *United States ex rel. Girard Co. v. Helvering*, 301 U. S. 540, 543; *Adams v. Nagle*, 303 U. S. 532, 542; *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 131-132; *United States Graphite Co. v. Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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